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95-1690

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VILLAGER POND, INC.,

Petitioner,

vs.

DARIEN, TOWN OF; DARIEN PLANNING AND ZONING COMMISSION, ALSO KNOWN AS PLANNING AND ZONING COMMISSION OF THE TOWN OF DARIEN; FREDERICK R. SAMMIS, INDIVIDUALLY AND AS SELECTMAN OF THE TOWN OF DARIEN; FRANKLIN E. PENN, INDIVIDUALLY AND AS CHAIRMAN OF THE DARIEN PLANNING AND ZONING COMMISSION; EDMUND F. SCHMIDT, INDIVIDUALLY AND AS A MEMBER OF THE DARIEN PLANNING AND ZONING COMMISSION; RAYMOND D. NURME, INDIVIDUALLY AND AS PLANNING AND ZONING DIRECTOR OF THE TOWN OF DARIEN; DAVID J. KEATING, INDIVIDUALLY AND AS ASSISTANT DIRECTOR/ZONING ENFORCEMENT OFFICER OF THE TOWN OF DARIEN; AND JANE F. BRANIGAN, INDIVIDUALLY AND AS AN AGENT OF THE TOWN OF DARIEN REPRESENTATIVE TOWN MEETING,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether constitutional protection from violations of due process and property rights should be subject to the threshold inquiry labeled the "clear entitlement test"?

2. Whether the Court of Appeals erred in unbundling the damages flowing from the violation of due process rights and simply characterizing those damages as takings and then dismissing them as not ripe?

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Villager Pond, Inc., petitioner, requests that this court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered May 17,

1995, sustaining the appeal from the District Court's dismissal for failure to state a claim under the Fifth and Fourteenth Amendments to the United States Constitution. The Court of Appeals reversed in part, affirmed in part, and remanded.

OPINION BELOW

The opinion of the United States Court of Appeals, Second Circuit, is reported at 56 F.3d 375 (Second Cir. 1995). It is reproduced in this petition at Appendix A.

JURISDICTION

The jurisdiction of this Court to decide federal questions is invoked pursuant to Title 28 United States Code Section 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads, in pertinent part, as follows: "[N]or [shall any person] be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment of the United States Constitution reads, in pertinent part, as follows: "[N]or shall any state deprive any person of life, liberty, or property without due process of law; . . ."

STATEMENT OF THE CASE

The petitioner-plaintiff, Villager Pond, Inc. ("the developer") filed a claim under 42 USC Section 1983 against the Town of Darien, the Darien Planning and Zoning Commission and various individual defendants, acting in both their individual and official capacities alleging that the defendants improperly withheld zoning compliance permits for condominium units built by the developer so as to coerce the developer into conveying two condominium units to the Town. The

Town subsequently sold the units for a profit which went to the general fund.

The District Court of Connecticut (Dorsey, J.) dismissed the complaint for failure to state a claim (Appendix B). The United States Court of Appeals for the Second Circuit reversed in part, affirmed in part, and remanded with direction to determine (1) whether the discretion to issue the zoning permits was so limited that a property interest existed in those permits, (2) to determine whether the adding of the condition of conveying two condominium units was so arbitrary that substantive due process was violated and (3) if so, whether the plaintiff suffered damages as a result of the delay in having the permits issued (App. 8-9).

The developer's complaint alleges violations of its constitutional rights to substantive and procedural due process and of its right to be compensated for a taking of its property for public use. The developer alleged that the defendant commission granted a special permit authorizing the construction of 37 condominium units stipulating that two units permanently be reserved for use by moderate income individuals. After purchase, financing, and construction commenced in reliance on the issuance of the special permit which on its terms did not require any conveyances to the Town, the developer alleges that the certificates of occupancy and zoning compliance permits were withheld by the Town despite the existence of a ministerial non-discretionary duty to issue them and that the municipal defendants coerced the petitioner by refusing to issue compliance permits unless Villager Pond conveyed the two moderate income units to the Town. The Town eventually conveyed one of the units for a substantial consideration but with no restriction limiting subsequent resale to persons of moderate income. The second unit was conveyed with some restrictions. The profits from both sales went into the Town's general fund. The conveyances took place within 3 years of the filing of the complaint in this action.

The Court of Appeals held that because the final special permit had already been granted, the petitioner's property

right in that permit had vested and, therefore, that the District Court improperly dismissed the due process claims on the ground that Villager Pond had no property interest in the special permit (App. 5-6). The Court of Appeals then remanded with direction to determine whether the discretion to issue the certificates of occupancy and zoning permits was so limited that a property interest existed in those permits and then determine whether the coerced conveyance was so arbitrary that substantive due process was violated and then, if so, whether the plaintiff suffered damages as a result of the delay in having the permits issued.

Although the petitioner alleged that the conveyance of the units was a coercive denial of due process, the Court of Appeals analyzed the takings claim as a separate cause of action sustaining the District Court's dismissal because the takings claim was not ripe.

REASONS FOR GRANTING THE WRIT

I. The "clear entitlement" test improperly defines constitutionally protected property interests shifting the focus from the issue of whether the plaintiff has been improperly deprived of property in violation of the due process clause to focus primarily on the degree of discretion enjoyed by the authority issuing related permits.

The so-called "clear entitlement" test is simply an excuse by the federal and state courts not to face the reality of what happens to property rights in the state's land use and court systems. Since nearly all permits are discretionary, there would be virtually no clear entitlements, no remedies and no constitutionally protected property interests. The results fly in the face of the Supreme Court's declaration:

> We see no reason why the takings clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . ."

Dolan v. City of Tigard, 512 U.S. _____ 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

There is no nexus between providing moderate income housing which is routinely done by profit oriented developers as well as non-profit organizations, and the defendants' post permit extra-legal requirement that the units be conveyed to the defendant Town of Darien. As the Court observed in *Nollan v. California Coastal Commission*, 483 US 825 at 837, 107 S.Ct. 3141 (1987) the Commission's regulatory authority was set completely adrift from its constitutional moorings when it claimed that a nexus existed between the salutary objective of providing moderate income housing and the extra-legal condition requiring conveyance of the units to the Town. Among other things, the Town was unjustly enriched. "The absence of a nexus left the (defendant) in the position of simply trying to obtain (property) through gimmickry, which converted a valid regulation of land use into 'an out-and-out plan of extortion'" *Nollan*, at 837. If there was such a nexus how could the town resell one of the units with no moderate income deed restrictions and pocket the money for both units?

It was once possible to argue that "[I]f a land owner meets the conditions set forth for a special exception, the board is bound to grant one," *Sheridan v. Planning Board of Stamford*, 159 Conn. 1, 266 A.2d 396, 404 (1969). "[T]he board does not have the untrammeled discretion to decide whether a special permit should or should not issue, and if all the conditions and standards of the ordinance are met, the board cannot deny the permit without sound reason." *Abramson v. ZBA of Westport*, 143 Conn. 211, 120 A.2d 827 (1956). That is no longer the law, however, because although the special permit is an administrative device and, therefore, in theory, must be granted if all the conditions have been met, recent decisions of the Appellate and Supreme Courts in Connecticut have treated the special permit process as discretionary. *Barberino Realty and Development Corp. v. P & Z Com'n of Farmington*, 222 Conn. 607, 613, 610 A.2d 1205, 1208-09 (1992). There is even a case where the general standards in the regulations have been imported to the special permit process to

support a denial, *Connecticut Health Facilities, Inc. v. ZBA of Stamford*, 29 Conn.App. 1, 6-7, 613 A.2d 1358, 1361-62 (1992). This is a jurisdiction where it is common for lawyers and the courts to confuse special permits or exceptions with variances, see *Mitchell Land Co. v. ZBA of Greenwich*, 140 Conn. 527 at 530, 102 A.2d 316, 319 f.n.2 (1964), where the court listed 32 cases in which variances had been sought but where the owners were actually, though unwittingly, seeking exceptions.

Property rights are better protected since Justice William Brennan's seminal dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); see *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 US 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (1987); *Nollan v. California Coastal Commission*; 107 S.Ct. 3141, 97 L.Ed.2d 677, 483 US 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. , 112 4 S.Ct 2886, 60 USLW at 4849, 120 L.Ed.2d 798 (1992); and, *Dolan v. City of Tigard*, *supra*. "[T]he applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches." *San Diego Gas*, 450 US at 661. The legislative policies of municipalities in adopting zoning ordinances is intentionally designed to confer the broadest possible discretion on the decision makers not only so they can maximize their unbridled discretion and, therefore, their power, but also to shield themselves from liability. Under the clear entitlement test, all a municipality need do in order to insulate itself from all claims for damages is sprinkle discretionary language throughout the regulations. In case this court views this argument as farfetched, let us look at Justice Brennan's analysis: "Invalidation of the unconstitutional regulation unaccompanied by payment of damages would hardly compensate the land owner for any economic loss suffered during the time his property was taken. Moreover, mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause." *San Diego Gas*, 450 US at 655, 101 S.Ct. at 1306. He explained in f.n. 22:

> "The instant litigation is a good case in point. The trial court, on April 9, 1976, found that the city's actions effected a "taking" of appellant's property on June 19, 1973. If true, then appellant has been deprived of all beneficial use of its property in violation of the Just Compensation Clause for the past seven years.
>
> Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow Attorneys the following advice:
>
> 'IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.'
>
> If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 10 C.3d 110, [109 Cal.Rptr 799, 514 P.2d 111 appears to allow the city to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.
>
> See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck." Longtin, Avoiding and Defending Constitutional Attacks on Land Use regulations (Including Inverse Condemnation), in 38B NIMLO Municipal Law Review 192-193 (1975) (emphasis in original)."

Justice Brennan suggested that you have to hit them in the pocketbook:

> "[L]and use planning commentators have suggested that the threat of financial liability for unconstitutional

> police power regulations would help to produce a more rational basis of decision making that weighs the cost of restrictions against their benefits. Such liability might also encourage municipalities to err on the constitutional side of police power regulations, and to develop internal rules and operating procedures to minimize overzealous regulatory attempts. After all, a policeman must know the constitution, then why not a planner?" (citation omitted) 450 U.S. 662, f.n. 26, 101 S.Ct. 1309.
>
> The voiding sanction obviously has left no impression upon the municipal defendants, see *D'Addario v. P&Z Cms'n, Darien,* 25 Conn. App. 137, 593 A.2d 511 (Conn. App. 1991) decided during the times of the instant municipal actions. Also reference West's Connecticut Practice Book Annotated Forms, 106.12-A, submitted by undersigned counsel based on another Darien land use extortion case in 1978.

Connecticut Supreme Court Justice Borden's *dissent* in *Kelley Property Devel. v. Town of Lebanon*, 226 Conn. 314, 343-352, 627 A.2d 909, 924-928 (1993), unequivocally rejects the clear entitlement test:

> ". . . I would hold that the ownership of property or the right to develop it for legitimate uses is sufficient to establish a constitutionally protected property interest under our own constitution. Both the Ninth and the Third Circuit Courts of Appeal; see *DelMonte Dunes v. Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990), *Bello v. Walker*, 840 F.2d 1124, 1127-30 (3rd Cir.) cert. denied, 488 U.S. 851, 109 S.Ct. 134, 102 L.Ed.2d 107 (1988); explicitly use this standard under the federal due process clause, as opposed to the Second Circuit's and our concomitant, more restrictive standard under the federal constitution."

There is a split in the circuits, the Second being in conflict with the Third and the Ninth, a Rule 10 consideration for granting this petition.

Justice Borden in an earlier First Amendment case, *Daughters of St. Paul v. ZBA, Trumbull*, 17 Conn.App. 53, 549 A.2d 1076 (1988), held that the general zoning standards were too discretionary and subjective to protect constitutional rights:

> "[T]he application of zoning regulations to restrict religious uses raises concern over the possible infringement of the constitutional rights guaranteed by the free exercise of religion clauses. . . . The possibility of discriminatory abuse of such regulations is obvious.
>
> "This possibility is rendered even more grave by virtue of the ability of zoning authorities essentially to insulate such a subjective decision from judicial review by failing to cite the facts that support their decision. . . . The great weight of the constitutional issues implicated leads us to conclude that, under the circumstances here, such a subjective decision as the one now under review must be reasonably supported by facts discernible in the record."

The subjective process in Connecticut does not pass constitutional muster for the First Amendment, so why should it pass muster for the Fifth, no longer a poor relation? Tondro, *Connecticut Land Use Regulation*, Section 7(C)(7), describes the abdication of the Connecticut Courts:

> "The [Connecticut Supreme] Court has sanctioned the emasculation of the substantive [zoning] doctrines' function of constraining the range of actions of a zoning commission . . . . [T]he Court has continued its relaxed supervision of local land use regulatory agencies through its oft-stated view that the local agencies are to be afforded a 'wide and liberal' discretion in making their decisions."

Closer court scrutiny, absent a damages remedy and constitutional protection of traditional property rights, would likely be a hollow victory: "[E]ven if the statement of reasons

requirement were enforced with a voiding sanction, commissions would soon learn how to 'fake it' writing up artificial reasons to satisfy the courts." *Davis, Discretionary Justice, A Preliminary Inquiry*, 105-106 (1969).

THE ZONING GAME, R. Babcock, (1966), a book cited with approval by Justice Brennan, *San Diego Gas*, U.S. 659, f.n. 25, 101 S.Ct. 1308, gives us a context:

> "Many planning commission hearings have taken on the character of an oriental bazaar where applicants wheel and deal with the commission on conditions and restrictions to be imposed on zoning. Some hearings are more like the ancient circuses in the coliseum of Rome in the days of Nero except that the Christians then got a better deal from the lions than some applicants do from the planning commission. . . . The protection of health, safety and general welfare has been forgotten in the desire to control competition, keep out foreigners, favor special interests, obtain public rights of way for free, zone tax users out and high tax payers in." Quoting Robert Michalski, "Zoning - The National Peril", Planning, 1963.

A government, ". . . by *ipse dixit*, may not transform private property into public property without compensation . . . ." *Webb's Fabulous Pharmacies, Inc., v. Beckwith*, 449 U.S. 155, 164 (1980), *Lucas, supra.*

> "[I]f the protection against physical appropriations of private property [is] to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property [must] necessarily [be] constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed].' *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). [W]hile property may be regulated to a certain extent,

> if regulation goes too far it will be recognized as a taking." *Ibid. Lucas, supra.*

The "clear entitlement" test, *RRI Realty Corp. v. Inc. Village Southampton*, 870 F.2d 911 (2nd Cir. 1989) gives free rein to the politicians to indulge that natural tendency with no risk or responsibility. If the framers of the Constitution had wanted to leave private property in the hands of the politicians why guarantee Just Compensation? Let us not underestimate the power of definition:

> *"But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.*
>
> *"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean - neither more nor less."*
>
> *"The question is," said Alice, "whether you can make words mean so many different things."*
>
> *"The question is," said Humpty Dumpty, "which is to be master - that's all." Carroll,* Through the Looking Glass (1872).

So who's to be master? The politicians via word games?

Although property tends to become what courts say it is and some circularity must be tolerated, the definition is not circular in its entirety because "the expectations protected by the constitution are based on *objective* rules and customs that can be understood as reasonable by all parties involved." *Lucas v. S. Carolina, supra*, 112 U.S. 2886, 112 S.Ct. 2886 (1992) (Kennedy, J., concurring). (emphasis added)

"[T]he historical compact recorded in the takings clause . . . has become part of our constitutional culture. . . . *Lucas v. S. Carolina*, 505 U.S. , 112 S.Ct. 2886, 2900 (1992). "[O]ur takings jurisprudence, has traditionally been guided by the understandings of our citizens regarding the content of, and the state's power over, the bundle of rights that they acquire when they obtain title to property."

> "The current constitutional regime of "anything goes" unleashes a whole set of unwelcome political and economic consequences. The relentless pattern of judicial decisions has reduced the constitutional protection of property to a guarantee of bare legal possession. Virtually all the rights of use and disposition are subject to political veto. The current constitutional vacuum thus creates a fatal schism between power and responsibility that a sound system of property rights seeks to avoid: when only one side may use, but the other may veto, stalemate becomes the order of the day. The takings clause, designed to overcome holdout and coordination problems, has been made to atrophy as these problems multiply. Power expands to fill a vacuum, and legislatures continue to stretch the limits of the law and conjure up new forms of restriction, seeking to come ever closer to the threshold that calls for them to pay compensation without ever crossing that line. Without just compensation, private losses to owners are left off the social ledger, so that large losses are systematically created for the sake of small gains." *Simple Rules for a Complex World*, Epstein (Harvard University Press, 1995).

The Second Circuit gives the keys to the courthouse to local government when it lets self-defined discretion be the threshold inquiry. If constitutionally protected property interests depend on whether the politicians and bureaucrats sprinkle discretionary language throughout the regulations, "[s]ince such [discretion] can be formulated in practically every case, this amounts to a test of whether the [zoning commission] has a stupid staff." *Lucas*, f.n. 12.

> "[I]t is evident that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man. Men have a sense of property: property is necessary to their subsistence, and correspondent to their natural wants and desires; its security was one of the objects that

> induced them to unite in society. No man could become a member of a community in which he could not enjoy the fruits of his honest labor and industry. The preservation of property, then, is a primary object of the social compact." *Van Horne's Lessee v. Dorrance*, 2 US 304, 310 (1795).

This petition should be granted to reconcile the split between the circuits and to develop the recent trend of protecting property rights.

II. The Court of Appeals erred in dismissing the takings claims as not ripe.

The damages to the developer from the violation of due process is measured by the value of the units conveyed and other proximately caused damages. These damages are part of a cause of action for a denial of due process. The Circuit Court took the petitioner's alternate cause of action, a violation of the just compensation clause, separated it from the damages caused by the violation of due process rights, and held that these damages claims were properly dismissed as not ripe under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195 (1985). The Court of Appeals improperly extended *Williamson*:

> "The inverse condemnation requirement of *Williamson* applies whenever compensation is sought for land that is taken, whether the taking occurs by direct government action or the indirect action of obtaining the land as a condition of issuing a permit."

Since this Court has declared that property rights will no longer be treated like a poor relation to our other rights protected under the constitution, petitioner respectfully suggests that the implications of *Williamson* as it affects these rights be reexamined and, in any event, that *Williamson* not be extended as suggested by the Court of Appeals in this case.

> "[W]hether the theory . . . be that there was a taking under the Fifth Amendment [or a substantive Due Process violation] is immaterial. In either event, the claim

> traces back to the prohibition of the Fifth Amendment, 'nor shall private property be taken for public use, without just compensation.' The Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' " *United States v. Dickinson*, 331 U.S. 745, 748, 67 S. Ct. 1382, 1384, 91 L.Ed. 1789 (1947), *San Diego Gas*, *supra*, at 654-655, f.n. 21.

Even if the theory of recovery were confined to due process damages, the text of both the Fifth and Fourteenth Amendments separately protect against deprivation of property without due process of law. To the extent that the Second Circuit purported to restrict due process damages to "damages as a result of the delay in having the permits issued" (A-1) the Court of Appeals erred. The error was compounded by characterizing the damages as "takings" damages, and therefore, unripe.

There is a split between the Circuit Courts of Appeal on these issues also. In this case, the Second Circuit took the deprivation of property portion of the due process claim, characterized it as a physical taking properly cognizable only under a takings theory and then dismissed it as unripe. In the Sixth Circuit those due process claims which are ancillary to a takings claim are unripe *Bigelow v. Michigan Dept. of Natural Resources,* 970 F.2d 154, 159-60 (6th Cir. 1992), but not if the deprivation was immediately sustained and concretely felt, *Nasierowski Bros. Inv. Co. v. City of Sterling Heights,* 949 F.2d 890, 894 (6th Cir. 1991).

The Tenth Circuit similarly distinguishes between regulatory takings and substantive due process claims applying different ripeness standards, *Landmark Land Co. of Oklahoma v. Buchanan,* 874 F.2d 717 (10th Cir. 1989). The Eleventh Circuit in *Eide v. Sarasota County,* 908 F.2d 716, 720-22 & 722 fn. 9 (11th Cir. 1990) has attempted to clarify the confusion in the substantive law by recognizing three separate causes of action involving takings and substantive due process issues describing (1) a "just compensation claim"; (2) a "due process takings claim"; and, (3) an "arbitrary and capricious due

process claim." Each of these claims is subject to its own ripeness standard. In comparison, the Second Circuit in *Southview Assoc., Ltd. v. Bongartz,* 980 F.2d 84, 98-97 (2d Cir. 1992), discusses the various types of takings and substantive due process claims and the ripeness standards applicable to each. No such explicit analysis was done in the instant case (A-8-9); the court restricted substantive due process damages to delay damages.

The Seventh Circuit, *Unity Ventures v. Lake County,* 841 F.2d 770, 774 (7th Cir. 1988) and the Third Circuit, *Taylor Inv. Ltd. v. Upper Darby Township,* 983 F.2d 1285, 1294 (3rd Cir. 1993) go even further and conclude that both procedural and substantive due process claims are subject to dismissal on ripeness grounds basing some of the analysis on the sweeping references to due process law in *Williamson County, supra,* which were clearly overbroad.

Dolan, Nollan, and *First English* offer real protection of property rights in particular and a more civil libertarian regime of protection and remedies for those rights guaranteed by our Federal Constitution. All of the various confused and unnecessarily complex reasons advanced by the Federal Courts amount to a protracted war of attrition that makes it impossible to have any realistic protection from the predatory practices of the sovereign. See *Bargaining with the State,* Epstein, Land Use Restrictions, Chapter 12 and *Takings and Ripeness,* 48 Vanderbilt LR1 (1995).

Shortly before our Federal Constitutional Republic was formed, our forefathers had rebelled against a sovereign who ruled by divine right. Their complaints are enshrined in the Declaration of Independence, part of which was devoted specifically to bureaucrats:

> "He [King George III] has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance."

Government, our current sovereign, may not rule by divine right but has still exercised a sovereign power to send hither

swarms of officers called regulators and planners and environmentalists who see their goals as worthwhile, viewing themselves as wearing the white hats and serving the causes of "truth, motherhood and apple pie." They will continue to win the war of attrition so long as the federal courts continue to abdicate what should be an aggressive civil libertarian protection of our constitutional guarantees.

CONCLUSION

The Fifth and Fourteenth Amendments of the United States Constitution will continue to be poor relations to the First and Fourth Amendments in the Second Circuit until the "clear entitlement" test is overruled and the ripeness doctrine is confined to limited issues.

Respectfully Submitted,

THE PETITIONER,
VILLAGER POND, INC.

BY: _____

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 698—August Term, 1994

(Argued: January 20, 1995 Decided: May 17, 1995)

Docket No. 94-7564

VILLAGER POND, INC.,

Plaintiff-Appellant,

—v.—

TOWN OF DARIEN, DARIEN PLANNING & ZONING COMMISSION, also known as Planning & Zoning Commission of the Town of Darien, FREDERICK R. SAMMIS, Individually and as Selectman of the Town of Darien, FRANKLIN E. PENN, Individually and as a Chairman of the Darien Planning and Zoning Commission, EDMUND F. SCHMIDT, Individually and as a Member of the Darien Planning and Zoning Commission, RAYMOND D. NURME, Individually and as Planning and Zoning Director of the Town of Darien, DAVID J. KEATING, Individually and as Assistant Director/Zoning Enforcement Officer of the Town of Darien and JANE F. BRANIGAN, Individually and as an Agent of the Town of Darien Representative Town Meeting,

Defendants-Appellees.

Before:

NEWMAN, *Chief Judge*,
and MINER, *Circuit Judge*.*

Appeal from a judgment entered on April 29, 1994 in the United States District Court for the District of Connecticut (Dorsey, J.) granting the defendants' motion to dismiss for failure to state a Due Process or Takings Clause claim under 42 U.S.C. § 1983.

Reversed in part, Affirmed in part, and Remanded.

RIDGELY W. BROWN, Darien, CT (Brown & Brown, Darien, CT, of counsel), *for Plaintiff-Appellant.*

JOHN WAYNE FOX, Stamford, CT (Curtis, Brinckerhoff & Barrett, P.C., Stamford, CT, of counsel), *for Defendants-Appellees.*

MINER, *Circuit Judge*:

Plaintiff-appellant Villager Pond, Inc. ("Villager Pond") appeals from a judgment entered on April 29,

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* The Honorable Lewis A. Kaplan of the United States District Court for the Southern District of New York, who was originally a member of the panel, recused himself just prior to oral argument. The case is being decided by the remaining two judges of the panel, pursuant to Local Rule § 0.14(b). *See Murray v. National Broadcasting Co.*, 35 F.3d 45 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 734 (1995).

1994 in the United States District for the District of Connecticut (Dorsey, J.) dismissing its complaint for failure to state a claim under 42 U.S.C. § 1983. Villager Pond alleges in its complaint that the Town of Darien ("the Town"), the Darien Planning and Zoning Commission ("the Commission"), and various individual defendants, acting in both their individual and official capacities, (collectively "the Municipal Defendants") improperly withheld zoning compliance permits[1] for condominium units built by Villager Pond so as to coerce Villager Pond to convey two condominium units to the Town.

The complaint alleges violations of Villager Pond's constitutional rights to substantive and procedural due process, and of its right to be compensated for a taking of its property for public use. The district court dismissed the complaint, having found that Villager Pond did not have a property right in the special permit that it had obtained for the condominium development at issue, and further having found that its takings claim was not ripe. For the reasons that follow, we reverse the district court's judgment in part, affirm in part, and remand to the district court for further proceedings consistent herewith.

BACKGROUND

On this motion to dismiss for failure to state a claim, we must accept the factual allegations in the complaint

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[1] In the complaint, these documents are referred to as "zoning compliance permits," but in their briefs and at oral argument the parties sometimes referred to the documents that allegedly were withheld as "certificates of occupancy." For the purposes of this opinion, we will use the terms "zoning compliance permits" or "compliance permits" to refer collectively to the documents allegedly withheld by the Town.

as true. Villager Pond is a corporation organized under the laws of the State of Connecticut, and has its place of business in the Town of Darien. With respect to the property at issue in this appeal, Villager Pond is a successor in right, title and interest to a general partnership operating under the name ESP Associates that, in August of 1985, applied to the Commission for approval of a special permit to construct forty condominium units. The condominium units were to be constructed on property designated as the Villager Pond Condominiums located in the Town of Darien. On October 29, 1985, the Commission granted the special permit, authorizing, among other things, the construction of thirty-seven condominium units on the property. The special permit required, however, that two of the units permanently be reserved for use by "moderate income" individuals. Final approval of the special permit, which included the provision for moderate-income units, was granted in January of 1986.

Villager's constitutional claims turn on the allegation that, beginning in approximately July of 1987 and continuing until 1988, the Municipal Defendants withheld the issuance of documents known as "zoning compliance permits" on the two moderate-income units and on other units in the condominium complex. Zoning compliance permits are prerequisites for the sale and occupancy of the units. According to the complaint, the permits were withheld despite the existence of a "ministerial, nondiscretionary duty" on the part of the Municipal Defendants to issue them. In an act characterized by the plaintiff as "coercion," the Municipal Defendants refused to issue the compliance permits unless Villager Pond conveyed the two moderate-income units to the Town, rather than, as agreed, to a non-profit corporation created for the

purpose of holding and managing the moderate-income properties. According to Villager Pond, nothing in the Town's Zoning Regulations, in Connecticut's General Statutes or in the terms of the special permit required that the units be conveyed to the Town.

On July 18, 1988, as required, Villager Pond entered into an agreement with the Town pursuant to which Villager Pond agreed to donate one of the moderate-income units to the Town and sell the other unit to the Town for $90,000. The Town eventually conveyed one of the units to an unidentified individual for a substantial consideration, but with no restriction limiting subsequent resale to persons of moderate income. The second moderate-income unit also was conveyed by the Town for substantial consideration, but this deed did contain some restrictions on the subsequent resale of the property. It appears that the Town now has issued the certificates of zoning compliance.

Upon the foregoing facts, Villager Pond's complaint alleged that the Commission's actions violated its rights to substantive and procedural due process, in violation of the Fourteenth Amendment, and also that the actions amounted to a taking of its property without just compensation, in violation of the Fifth and Fourteenth Amendments. The defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), and, in the alternative, moved for a more definite statement in anticipation of the assertion of immunity defenses. The district court dismissed the complaint for failure to state a claim. With respect to Villager Pond's claims of due process violations, the district court concluded that Villager Pond's allegations did not establish a protected property interest. With respect to Villager Pond's takings claim, the district court concluded that it was unripe

because Villager Pond had failed to seek compensation under the state constitution's takings clause. The district court therefore denied as moot the defendants' motion for a more definite statement. Villager Pond appeals.

DISCUSSION

The district court's dismissal of Villager Pond's action is a ruling of law that we review *de novo*. *See Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 99 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993). In exercising this review, our "task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. . . . [I]n passing on a motion to dismiss, . . . the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 235-236 (1974). Viewed under these standards, we conclude that we must remand.

1. Due Process

When a landowner alleges that he has been deprived of property in violation of the due process clause by the actions of a state zoning authority, we begin our inquiry by determining whether a constitutionally cognizable property interest is at stake. An applicant for a governmental permit has a protected property interest in the permit being sought only where "the applicant has a 'clear entitlement' to the approval sought from the government official or administrative body." *Walz v. Town of Smithtown*, ___ F.3d ___, ___ (2d Cir. 1995). In assessing whether a plaintiff has a "clear entitlement" to a permit, we "focus primarily on the degree of discretion enjoyed by the issuing authority, not the estimated prob-

ability that the authority will act favorably in a particular case." *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989); *see also Gagliardi v. Village of Pawling*, 18 F.3d 188, 192-93 (2d Cir. 1994). A clear entitlement, and, in turn, a constitutionally protected property interest, exists only when "the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured." *RRI Realty*, 870 F.2d at 918. These standards have been crafted to strike the necessary balance between the landowner's need for constitutional protection and local governments' need to regulate matters of local concern. *See Zahra v. Town of Southhold*, ___ F.3d ___, ___ (2d Cir. 1995).

Appellant contends that the Supreme Court's recent decision in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), overrules our line of cases, such as *Walz* and *RRI*, which makes the existence of a property interest in a permit being sought turn on the restricted discretion of the authority issuing the permit. We disagree. *Dolan* protects a landowner's right, in some circumstances, not to be required to surrender his land as a condition of obtaining a permit, whether the discretion otherwise available to the issuing authority is broad or narrow. *Walz* and *RRI* are concerned with the distinct issue of whether an applicant for a permit has a property interest in the permit being sought.

After correctly recognizing the governing standards, the district court held that Villager Pond's allegations were insufficient to establish the existence of a property right, noting that "[p]laintiff does not allege an entitlement or property interest in the special permit. Nor does plaintiff allege that the Commission lacked discretion in

the issuance and enforcement of special permits. The absence of these allegations defeats [its] . . . due process claims." The court therefore dismissed the due process claims. This was error. Villager Pond alleged that, at the time the Municipal Defendants began to withhold the zoning compliance permits, the final special permit *already had been granted.* At that point, the "clear entitlement" test no longer was applicable to the special permit because the test applies only to permits being sought. The special permit, once issued, unquestionably was the property of Villager Pond. Therefore, the district court improperly dismissed the due process claims on the ground that Villager Pond had no property interest in the special permit.

The situation is different with regard to Villager Pond's asserted property interest in the zoning compliance permits. In order to establish a protected property interest in those permits, Villager Pond will have to establish a lack of discretion on the part of officials to deny their issuance. In *Sullivan v. Town of Salem*, 805 F.2d 81, 84-85 (2d Cir. 1986), we reversed a judgment dismissing plaintiff's due process claim where plaintiff had alleged that, although the houses he had built satisfied all the requirements of state and municipal law, town officials nonetheless had withheld certificates of occupancy for the houses. We reasoned that "[i]f the houses complied with the applicable state and municipal requirements, there was no element of discretion or judgment remaining for the building official to exercise in determining whether to issue the certificates." *Id.* at 85. Similar principles apply in this case, and upon remand the district court should consider whether Villager Pond can establish a property interest in the zoning compliance permits at the time they were withheld.

If the district court determines that, prior to the issuance of the zoning permits, the discretion to issue them was so limited that a property interest existed in these permits, then the court must determine whether the adding of the condition of conveying two parcels was so arbitrary that substantive due process was violated, and, if, so, whether the plaintiff suffered damages as a result of the delay in having the permits issued.

2. Takings

The district court properly dismissed as unripe Villager Pond's claim that it had been unconstitutionally deprived of compensation for the taking of its property. By "property" alleged to be taken unconstitutionally, we understand Villager Pond to mean its interests in the two units conveyed, allegedly by coercion. A landowner "has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985). Thus, before a plaintiff may assert a federal takings claim, he must first seek compensation from the state if the state has a "reasonable, certain and adequate provision for obtaining compensation." *Id.* at 194 (internal quotations omitted); *see also Southview Assoc., Ltd. v. Bongartz*, 980 F.2d 84, 99 (2d Cir. 1992). Moreover, relief under a state compensation procedure must be attempted even where it "remains unsure and undeveloped." *Southview*, 980 F.2d at 99; *see also Austin v. City and County of Honolulu*, 840 F.2d 678, 680-81 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988). In *Southview*, for example, this court held that a takings claim was unripe where the plaintiff had not attempted to obtain

compensation under the Vermont State Constitution's takings clause, even though no court ever had interpreted that clause to require compensation for a regulatory taking. 980 F.2d at 99-100.

In light of the foregoing, it is clear that Villager Pond has not met the requirements outlined in *Williamson*. Here, as in *Southview*, the state constitution contains a straightforward takings clause:

> The property of no person shall be taken for public use, without just compensation therefor.

Conn. Const. Art. 1, § 11. This clause may be used as the basis of an inverse condemnation action to recover compensation for property taken from private individuals, even in the absence of a separate statutory remedy. *See Laurel, Inc. v. State*, 169 Conn. 195, 200 (1975). And although no Connecticut case has been cited wherein compensation was provided for a taking like the one alleged here, Villager Pond is still required to look to the state for compensation before its takings claim will lie. *See Southview*, 980 F.2d at 99-100.

Villager Pond attempts to avoid this result by contending that a plaintiff who alleges a physical taking, as opposed to a regulatory taking, is not required to seek compensation in a state proceeding before the claim will be considered ripe. In making this contention, Villager Pond cites *Southview*, wherein the plaintiff made the same argument by relying upon language in a Ninth Circuit case, *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281-82 n.28 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988). We reject Villager Pond's contention. First, reliance upon *Southview* for this contention is misplaced, because in that case the issue was not reached. *See id.* at 96. Second, the *Hall* decision has since been clarified by

the Ninth Circuit: "Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). We agree with this statement. *Williamson* drew no distinction between physical and regulatory takings, and the rationale of that case, that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State," 473 U.S. at 195, demonstrates that any such distinction would be unjustified. Thus, regardless of whether Villager Pond's claim alleges a physical or regulatory taking, the claim is not yet ripe for review.

In this connection, we also reject Villager Pond's argument that the question whether an action lies under the state constitution's takings provision has been answered in the negative by *Kelley Property Dev., Inc. v. Town of Lebanon*, 226 Conn. 314 (1993). In *Kelley*, the Supreme Court of Connecticut held that no state common-law cause of action for damages existed for official deprivations of due process, and it further refused to infer a cause of action under the theory of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and its progeny from the state constitution's due process clause. *See id.* at 330-343. As is clear, those conclusions have little to do with whether an adequate remedy for the asserted taking of the condominium units exists under the state constitution's takings clause. So long as a remedy potentially is available under the state constitution's provision, Villager Pond has not yet met the preconditions for a valid takings claim.

Finally, the same considerations defeat Villager Pond's argument on appeal that it has pleaded a cause of action under *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), a case handed down after the district court's judgment in this case. In *Dolan*, the Supreme Court held that where a municipality makes an adjudicative decision to condition the grant of a zoning permit on an applicant's dedication of property for public use, the municipality must demonstrate an "essential nexus" and "rough proportionality" between its legitimate zoning interest and the property dedication required. *See id.* at 2317-19. If this showing could not be made here, for example, the zoning decision would become a taking of the two units for which Villager Pond would have to be compensated. *See id.* at 2316-2317; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-36 (1987). However, unlike in *Dolan*, where the landowner challenged the conditions placed on the grant of a permit before the property was "taken," title to the two units conveyed in this case became vested in the Town before the suit was brought in the district court. Accordingly, Villager Pond's claim under *Dolan* is that, as a result of the conditions placed on the grant of the certificates of zoning compliance, the Town has taken property without providing just compensation. In this situation, *Williamson* dictates that Villager Pond must attempt to obtain compensation in the state courts before it may assert a claim under the Takings Clause in federal court. The inverse condemnation requirement of *Williamson* applies whenever compensation is sought for land that is taken, whether the taking occurs by direct governmental action or by the indirect action of obtaining the land as a condition of issuing a permit.

CONCLUSION

For the foregoing reasons, we reverse so much of the judgment that dismissed plaintiff's due process claim for failure to allege a protected property interest, we affirm so much of the judgment that dismissed plaintiff's takings claim as unripe, and we remand for proceedings consistent with this opinion.

APPENDIX B

APPENDIX B

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

VILLAGER POND, INC. :

– vs – : Civil No. 3:93CV00712 (PCD)

TOWN OF DARIEN,
ET AL. :

RULING ON MOTION TO DISMISS

Plaintiff filed a complaint against the Town of Darien, the Darien Planning and Zoning Commission ("Commission"), and a number of officials of the Town or members of the Commission, both individually and officially. Defendants move to dismiss Villager Pond's complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In the alternative, defendants move that plaintiff be ordered to provide a more definite statement.

I. BACKGROUND

In 1985, plaintiff's predecessor, ESP Associates, applied to the Commission for a special permit to construct 40 condominium units on a subdivision known as Villager Pond Condominium. The Commission approved a permit for 37 units, two of which were to be reserved for moderate income occupants. Plaintiff alleges that during 1987 and 1988, the Commission, and defendants Nurme and Keating, withheld the issuance of zoning compliance permits, claiming that the two units for moderate income persons must be conveyed to the Town.

Plaintiff further alleges that the Town coerced an "agreement" to "donate" one of the reserved units to the Town, and to "sell" the second unit to the Town for $90,000. Plaintiff complied. The

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Town later conveyed one unit without limiting later conveyance to moderate income persons. The Town conveyed the second unit with such conditions.

II. DISCUSSION

Plaintiff alleges, under 42 U.S.C. § 1983, infringement of its Fifth Amendment protection against deprivation of property without just compensation. Plaintiff also alleges infringement of its Fourteenth Amendment procedural and substantive due process rights. Defendants have moved, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), for dismissal. Defendants assert the lack of subject matter jurisdiction because plaintiff's claims are not yet ripe. In addition, as to the due process claims in count two, defendants assert that plaintiff has failed to allege the elements of a due process claim.

A. Due Process Rights

Plaintiff alleges defendants' violation of its Fourteenth Amendment substantive and procedural due process rights. It alleges that in requiring that the two reserved condominium units be conveyed to the Town, its special permit was modified without notice or a meaningful opportunity to be heard. Plaintiff also alleges that the requirement of conveyance to the town of the two units was "not substantially related to a legitimate governmental objective."

These due process issues are central to a federal court's relationship to local planning and zoning. However, the role of the federal courts "is not and should not be to sit as a zoning board of appeals." *Village of Belle Terre v. Boraas,* 416 U.S. 1, 13 (1974).

Disappointed applicants to planning and zoning authorities mounting a § 1983 due process claim must demonstrate "a legitimate claim of entitlement" to the permit sought. *Yale Auto Parts, Inc. v. Johnson,* 758 F.2d 54 (1985). The complainant must show that "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted." *Id.* at 59. There must be a "property interest" in the permit at issue for a

denial to constitute infringement of due process rights. *Sullivan v. Town of Salem,* 805 F.2d 81, 84-85 (2d Cir. 1986).

Where a property owner has the requisite property interest in a permit or certificate, its denial by the local authority is an infringement of Fourteenth Amendment rights suitable for § 1983 redress. The owner's entitlement interest does not turn on the character of the local authority's actions however. In *RRI Realty Corp. v. Incorporated Village of Southampton,* 870 F.2d 911, *cert. denied,* 493 U.S. 893 (1989), the notion of "certainty or a very strong likelihood" in the rule of *Yale Auto Parts* was interpreted to mean that whether the property owner has an entitlement depends upon whether the permit "could have been denied on non-arbitrary grounds." *Id.* at 918.

> If federal courts are not to become zoning boards of appeals (and not to substitute for state courts in their state law review of local land-use regulatory decisions), the entitlement test of *Yale Auto Parts*—"certainty or a very strong likelihood" of issuance—must be applied with considerable rigor. Application of the test must focus primarily on the degree of discretion enjoyed by the issuing authority, not the estimated probability that the authority will act favorably in a particular case. . . . The "strong likelihood" aspect of *Yale Auto Parts* comes into play only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured; an entitlement does not arise simply because it is likely that broad discretion will be favorably exercised.

Id. The court added that because the analysis emphasized the latitude of the local commission's discretion, the determination of the property owner's entitlement would "normally be a matter of law for the court." *Id.*

In the present case, *Yale Auto Parts,* elaborated by *RRI Realty,* requires a property interest in the zoning compliance permit issued by the Commission. Plaintiff's property interest

depends upon the breadth of the Commission's discretion. Plaintiff was granted authority to construct 37 units, two of which were to be permanently reserved for occupancy by parties having "moderate income." Plaintiff then alleges that the Commission, and defendants Nurme and Keating, abused their discretion concerning the special permit by requiring conveyance of the two reserved units to the Town. Plaintiff does not allege an entitlement or property interest in the special permit. Nor does plaintiff allege that the Commission lacked discretion in the issuance and enforcement of special permits. The absence of these allegations defeats their § 1983 due process claims. The conveyance requirement implemented or enforced the use restriction imposed on the two reserved units. Conveyance, subject to the entitlement to compensation, did not deny plaintiff a right of expectation contra to *Yale Auto Parts.* Further, any impropriety on the part of the town in the resale of the units and the enforcement of the "moderate income" limitation would not generate a cause of faction in plaintiff which, by then, would have no right, title or interest in those units.

B. Taking of Property Without Just Compensation

In considering a motion to dismiss, broad factual allegations of injury following from defendants' conduct are sufficient to establish subject matter jurisdiction and to defeat a motion to dismiss for failure to state a claim. *Scheuer v. Rhodes,* 416 U.S. 232, 235-36 (1974). "When a federal court reviews the sufficiency of a complaint, . . . its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims . . . . [I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Id; see also Lujan v. Defenders of Wildlife,* ___ U.S. ___, ___, 112 S.Ct. 2130, 2137 (1992). A pleading of deprivation of property, under color of state law, without just compensation, must allege that opportunities to obtain com-

pensation have been exhausted. *Williamson County Regional Planning Com'n. v. Hamilton Bank,* 473 U.S. 172, 194, 194 n.13 (1985). "[B]ecause the Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Id.*

In *Williamson,* the Supreme Court established a two-pronged test of the ripeness of takings claims: (1) the action of the governmental agent alleged to have caused the taking must be a "final decision," *Id.* at 186; and (2) where state law offers "reasonable, certain and adequate provision for obtaining compensation," the Fifth Amendment has not been infringed "until it has used the procedure and been denied just compensation." *Id.* at 195. Plaintiff argues that finality of governmental action required to satisfy the first prong of *Williamson* depends upon whether the property owner's "investment backed expectations" have been blunted in a way that cannot be corrected by further administrative proceedings. Plaintiff asserts that where, as in the present case, the owner has been stripped of title and possession of the property, there is finality to satisfy *Williamson.*

As to the second prong of *Williamson,* exhausting available opportunities for compensation, plaintiff argues that Connecticut lacks the "specific statutory" inverse condemnation remedy that was available under Tennessee law to the *Williamson* plaintiffs. It claims that Connecticut has no statutory or common law action which provides a property owner with a claim for money damages against a municipality for inverse condemnation caused by land use regulations. Plaintiff argues that because there is no such procedure to exhaust, the second prong of *Williamson* does not apply.

Defendants assert that even if plaintiff has satisfied the "final decision" prong of *Williamson,*[1] the complaint fails to satisfy the second prong.

In *Southview Associates, Ltd. v. Bongartz,* 980 F.2d 84 (1992), *cert. denied* 113 S.Ct. 1586 (1993), involving a denial of a land use permit by the Vermont Environmental Board, the court explained:

> [A] state compensation procedure will be deemed available and adequate within the meaning of *Williamson* even when that procedure remains unsure and undeveloped.

Id. at 99 (citations omitted). Neither the statutory nor common law in Vermont provided an action compensating takings by inverse condemnation. However, the Vermont Constitution contains a just compensation clause which was declared sufficient to satisfy the *Williamson* requirements of a "reasonable, certain and adequate provision for obtaining compensation." *Southview,* 980 F.2d at 100 (citation omitted).[2]

The Connecticut Constitution contains a just compensation clause similar to Vermont's:

> The property of no person shall be taken for public use, without just compensation therefor.

Conn. Const. Art. 1 § 11. The Connecticut Supreme Court has held this provision sufficient to support an inverse condem-

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[1] Defendants concede that a "physical" taking of property, as opposed to a "regulatory" taking, satisfies the *Williamson* "final decision" requirement. Defendants argue that their actions constitute a regulatory taking.

[2] The clause states:

> [W]henever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money.

Vt. Const. ch. 1, art. 2.

nation action. *Laurel, Inc. v. State,* 169 Conn. 195 (1975) (*Laurel I*).

> If there is no legislation that makes provision for compensation for property taken, the [Connecticut] Constitution does; and that is enough.

Id. at 200 (citation and internal quotation marks omitted).

Subsequently, in an appeal of a damage award, it was held

> . . .that just compensation requires that the condemnee shall be put in as good a condition pecuniarily as he would have been in had the property not been taken.

Laurel, Inc. v. Commissioner of Trans., 180 Conn. 11, 37 (1980) (*Laurel II*). Applying this philosophy, the court upheld the aspect of the damage award that represented diminished profitability of the project, despite the fact that "the lion's share of the property" remained in the plaintiff's possession. *Id.* 465. Thus, a "reasonable, certain and adequate" compensatio procedure exists in Connecticut law which plaintiff must exhaust before a Fifth Amendment § 1983 claim can be considered ripe. Plaintiff does not allege pursuit and exhaustion of such procedure. Its constitutional claim is, therefore, not ripe for consideration.

III. CONCLUSION

The motion to dismiss (doc. #14) is granted. The motion fo more definite statement (doc. #14) is denied as moot.

SO ORDERED.

Dated at New Haven, Connecticut, this 25th day of April, 1994.

/s/ Peter C. Dorsey

Peter C. Dorsey
United States District Judge

Supreme Court, U.S.
FILED
JUN 13 1996
OFFICE OF THE CLERK

No. 95-1690

In The

Supreme Court of the United States

October Term, 1995

VILLAGER POND, INC.,

Petitioner,

vs.

DARIEN TOWN OF; DARIEN PLANNING AND ZONING COMMISSION, ALSO KNOWN AS PLANNING AND ZONING COMMISSION OF THE TOWN OF DARIEN; FREDERICK R. SAMMIS, INDIVIDUALLY AND AS SELECTMAN OF THE TOWN OF DARIEN; FRANKLIN E. PENN, INDIVIDUALLY AND AS CHAIRMAN OF THE DARIEN PLANNING AND ZONING COMMISSION; EDMUND F. SCHMIDT, INDIVIDUALLY AND AS A MEMBER OF THE DARIEN PLANNING AND ZONING COMMISSION; RAYMOND D. NURME, INDIVIDUALLY AND AS PLANNING AND ZONING DIRECTOR OF THE TOWN OF DARIEN; DAVID J. KEATING, INDIVIDUALLY AND AS ASSISTANT DIRECTOR/ZONING ENFORCEMENT OFFICER OF THE TOWN OF DARIEN; AND JANE F. BRANIGAN, INDIVIDUALLY AND AS AN AGENT OF THE TOWN OF DARIEN REPRESENTATIVE TOWN MEETING,

Respondents.

Petition For A Writ Of Certiorari To United States Court Of Appeals, Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals, after reversing the District Court's dismissal of the petitioner's due process claim, properly remanded that claim for further proceedings in the District Court?

2. Whether the Court of Appeals properly affirmed the District Court's dismissal of the petitioner's Fifth Amendment takings claim on the grounds that the claim was not ripe for adjudication as a result of the petitioner's failure to seek compensation in the state courts?

3. Whether the Court of Appeals properly affirmed the District Court's dismissal of the petitioner's Fifth Amendment takings claim because the petitioner, by agreeing to the conveyance of its property to the respondent Town, could not satisfy the final decision prong of the *Williamson* ripeness test?

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OPINIONS BELOW

The opinion of the District Court (Petitioner's Appendix B) is unreported. The opinion of the Court of Appeals for the Second Circuit (Petitioner's Appendix A) is reported at 56 F.3d 375.

STATEMENT OF THE COURT'S LACK OF JURISDICTION

The Court lacks jurisdiction over the first question presented by the petitioner, which seeks review of that portion of the Court of Appeals' opinion that remanded petitioner's due process claim with instructions to determine whether the petitioner had a protected property interest in zoning compliance permits allegedly withheld by the respondents. Upon remand, the respondents/defendants filed a Motion for Summary Judgment or in the Alternative a Motion for Dismissal for Failure to Prosecute, to which the petitioner filed no objection. On April 22, 1996, the District Court granted the defendants' motion absent objection and entered a final judgment in their favor on May 31, 1996. Accordingly, there is no longer any cause of action pending as to the claims remanded by the Court of Appeals. Thus, the petitioner has failed to preserve the first question presented in its petition.

This Court also lacks jurisdiction over the second question presented by the petitioner, which seeks review of the Court of Appeals' affirmance of the dismissal of the petitioner's takings claim, as the petitioner did not raise that question below. Although the petitioner now

attacks the Court of Appeals decision for improperly characterizing the claim dismissed as a takings claim, as reflected in paragraphs four and five of the Statement of Issues Presented for Review (Respondents' Appendix A) submitted by the petitioner to the Court of Appeals, the petitioner itself characterized its claim as a Fifth Amendment takings claim, just as it did in arguing against the respondents' motion to dismiss in the District Court. It is only now, for the first time, that the petitioner takes the position that the claim it referred to below as a "physical takings" is really a due process claim which the Court of Appeals improperly treated as a takings claim. The petitioner's failure to raise this issue before the Court of Appeals, and indeed, its position to the contrary in all the proceedings below, preclude the raising of this question here for the first time.

The statute cited in the petition's jurisdictional statement, 28 U.S.C. § 1257(a), governs certiorari review of state court decisions and therefore is not the appropriate jurisdictional statute for the present petition.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Title 42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any

rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The following sections of the Town of Darien Zoning Regulations, which are set out in Respondents' Appendix B:

a. Article IV, § 400 et seq.

b. § 503

c. § 504.15

d. § 505.1

e. § 506.2

f. § 513

g. § 1102(a)

h. § 1103(a)

STATEMENT OF THE CASE

On April 2, 1993, the plaintiff, Villager Pond, Inc., brought this action against the Town of Darien ("Town"), the Planning and Zoning Commission for the Town ("Commission"), and the remaining defendants, both as individuals and as agents for the Town and Commission. The plaintiff alleged that, on August 16, 1985, its predecessor-in-interest, a partnership known as ESP Associates ("ESP"), applied to the Commission for approval of a special permit to construct forty condominium units in a subdivision named Villager Pond Condominiums located in the Town. The plaintiff did not allege that ESP had a

right to construct the forty units on its property or that ESP was entitled to approval of its application. Indeed, the court may infer from a review of the relevant Darien Zoning Regulations and from the fact that ESP needed a special permit that the plaintiff was not entitled to unconditional approval of the development of its property as originally proposed but was required to seek a special exception to proceed with it.[1] In particular, § 503 of the Darien Zoning Regulations, entitled "Principal Uses Requiring Special Permits," provided for multi-family dwellings, such as condominiums, subject to approval of a special permit in accordance with standards enunciated elsewhere in the regulations. Section 504.15 of the Zoning Regulations established the maximum density for such permitted uses.

The amended complaint alleged that the Commission, on October 29, 1985, authorized the construction of thirty-seven units and required ESP to reserve two of the thirty-seven units for occupancy by moderate income parties. Although the amended complaint did not identify the applicable regulation, the Commission utilized the grant in § 505.1 of the Zoning Regulations for an increase in the maximum density pursuant to § 506.2, which in turn provided that density may be increased by not more than forty percent if at least forty percent of the

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[1] Upon remand, the respondents submitted evidence of this fact in support of their Motion for Summary Judgment. *See* Respondents' Appendix E. This factual statement was not controverted by the petitioner, who did not oppose the motion, and it is therefore deemed admitted by the petitioner. *See* Local Rules of Civil Procedure for the United States District Court for the District of Connecticut, Rule 9(c)(1).

additional density units are established as moderate income dwelling units.[2] Sections 505.1 and 506.2, by their terms, are not mandatory provisions; rather, they are permissive grants and in actuality the petitioner on its own proposed the use of these regulations in connection with its development application in order to increase the number of units it could build.[3] The Commission's approval of ESP's proposal gave ESP the maximum density increase available to it under the zoning regulations.[4]

The plaintiff alleged that, from July 1987 until some time in 1988, the Commission, the defendant Nurme, the Town's Planning Director, and the defendant Keating, the Town's Zoning Enforcement Officer, withheld zoning compliance permits (also referred to as certificates of occupancy) for various units in the condominium development, claiming that the two moderate income units had to be conveyed to the Town.

The amended complaint asserted, without any supporting factual allegations, that the Town coerced the plaintiff to execute an agreement that compelled it to donate one of the moderate income units to the Town and to sell the second one to the Town for $90,000. The Amended Complaint did not assert any allegations from which it could be inferred that the agreement was anything other than a stipulated resolution of the parties' differences.[5] Although no time frame was pleaded, the

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[2] See fn. 1, infra.

[3] See fn. 1, infra.

[4] See fn. 1, infra.

[5] See fn. 1, infra.

plaintiff had apparently succeeded to ESP's interests in the property by this time. It asserted that the Town thereafter sold both the units, one of which was conveyed without the moderate income restriction. The petition states that the Town eventually resold the two units at a profit, which went to the Town's general fund. Petition at p.3. No such allegation was made in the amended complaint. Similarly, although the petition states that the conveyances took place within three years of the filing of the complaint in this action, this is not alleged, nor can it be inferred from the amended complaint. Furthermore, it is an inaccurate statement as one of the two units was resold by the Town in 1988, almost five years before the present action was commenced.[6] Finally, the petitioner fails to point out that the amended complaint alleges that the agreement between the Town and the petitioner to convey the two units to the Town was executed in July 1988, also almost five years before the commencement of this action.

The plaintiff asserts that the defendants had a ministerial, nondiscretionary duty to issue the zoning compliance permits. The plaintiff, however, never alleges that it had completed all the conditions precedent to obtaining the zoning compliance permits, which it had not done.[7]

The amended complaint in count one asserted that the Town, the Commission and the individual defendants, acting pursuant to the customs or policies of the Town, deprived the plaintiff of its property rights under

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[6] See fn. 1, infra.

[7] See fn. 1, infra.

the Fifth Amendment, while the second count alleged a deprivation of its property in violation of the plaintiff's Fourteenth Amendment rights to substantive and procedural due process. The plaintiff seeks damages of $3,500,000.00.

The defendants moved to dismiss the complaint pursuant to Fed. R. Civ.P. 12(b)(1) and 12(b)(6) on the following grounds: 1) for lack of subject matter jurisdiction, as the plaintiff had failed to allege facts satisfying the finality and ripeness requirements imposed on § 1983 land use claims by the opinion in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985); and 2) for failure to state a claim for which relief could be granted, because (a) the plaintiff had failed to allege that it had a protected property interest in the permits without the conditions imposed so as to give rise to the due process claims; and (b) the plaintiff had failed to plead its claims against the individual defendants with sufficient particularity to establish that its claims would overcome the defendants' anticipated defenses of immunity. In the alternative, the defendants requested that the plaintiff provide more definite statements requesting, *inter alia*, that the procedural due process violation be pleaded in a separate count from the substantive due process claim.

The plaintiff, in opposing the motion to dismiss, offered no evidence. Based upon the allegations and the lack of any allegation that the plaintiff sought relief at the state level, the district court granted the defendants' motion to dismiss the takings claim as not ripe. It also dismissed the due process claim on the ground that the plaintiff had not alleged that it was entitled to the special

permit without any conditions and denied as moot the defendants' alternative motion for a more definite statement.

The plaintiff appealed the ruling to the Second Circuit Court of Appeals, which upheld the dismissal of the takings claim. 56 F.3d at 381. The Court of Appeals, however, reversed the dismissal of the plaintiff's due process claim and remanded it with instructions to the District Court to consider whether the plaintiff had a protected property interest in the zoning compliance permits and, if so, whether the defendants' conduct was so arbitrary as to constitute a due process violation. 56 F.3d at 379. Neither the Court of Appeals nor the District Court expressly addressed the plaintiff's procedural due process claim as distinct from its substantive due process claim. Subsequent events rendered this issue moot, however.

On August 17, 1995, the petitioner originally filed this petition for writ of certiorari with this Court. By letter dated August 31, 1995, the Clerk of the Supreme Court returned the petition as it failed to comply with Rule 33. The petition was not immediately refiled and by letter dated February 13, 1996, the Clerk informed the petitioner's counsel that the petitioner had sixty days, or until April 13, 1996, to refile the petition. On April 19, 1996, some seven months after it was originally filed, and more than sixty days after the Clerk's letter requesting refiling, the petition was refiled in the proper format, with substantive changes to its contents, and the matter was finally docketed.

The petition also fails to inform the Court about subsequent proceedings in the District Court that affect this Court's decision whether to grant certiorari review. Upon remand, the plaintiff agreed to respond to the defendant's renewed request for a more definite statement as to the remanded count by filing a revised amended complaint by August 17, 1995. After missing that deadline and having its existing complaint stricken by the district court, the plaintiff finally filed Plaintiff's More Specific Statement on December 1, 1995, *see* Respondents' Appendix C, which, *inter alia*, set out the plaintiff's remaining substantive due process claim and its procedural due process claim in separate counts. No allegations were added, however, to address the issue of whether the plaintiff had a property interest in the permits alleged to have been withheld.

The district court also set new discovery deadlines, as well as deadlines for dispositive motions, after declining to stay proceedings while this Court reviewed the petition for writ of certiorari. See Plaintiff's Motion for Clarification set out in Respondents' Appendix D. Upon the conclusion of discovery, the defendants filed a motion for summary judgment on the remaining due process claims with a statement of undisputed facts, as required by local rule. *See* Respondents' Appendix E. The defendants' motion sought in the alternative a Judgment of Dismissal based on the plaintiff's failure to diligently prosecute this case. The plaintiff never responded to the defendants' motion, nor did it file any statement of facts as to which a genuine issue of fact existed. *See* Local Rules of Civil Procedure for the United States District Court for the District of Connecticut, Rule 9(c)(2). On

April 22, 1996, the district court granted the motion, noting the absence of any objection by the plaintiff, and on May 31, 1996, entered final judgment in favor of the defendants. As of the date of the submission of this brief, the plaintiff had not appealed that judgment.

REASONS FOR DENYING THE WRIT

I. THE COURT LACKS JURISDICTION FOR CERTIORARI REVIEW

A. The District Court's Entry of Judgment, Absent Objection, Against the Petitioner On the Remanded Due Process Claim Renders the First Question Presented Unreviewable

" 'The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.' " *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975) *quoting Steffel v. Thompson*, 415 U.S. 452, 459 n.10, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505 (1974) (vacating judgment where cases became moot and remanding with instructions to dismiss complaint). "This court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. . . . To adjudicate a cause which no longer exists is a proceeding which this court uniformly has declined to entertain." *Brown v. Schwartz*, 261 U.S. 216, 43 S.Ct. 263, 67 L.Ed.2d 620 (1923); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ___ U.S. ___, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994) (recognizing Court's inability to

review merits of claim rendered moot by parties' settlement during pendency of certiorari proceedings).

Moreover, in order to avail itself of its remedy of appellate review, the petitioner has a duty to preserve its rights. *See U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 40, 71 S.Ct. 104, 107, 95 L.Ed.2d 36 (1950). As this Court has noted, "[p]laintiffs are masters of their complaints and remain so at the appellate stage of litigation." *Webster v. Reproductive Health Services*, 492 U.S. 490, 512, 109 S.Ct. 3040, 3053, 106 L.Ed.2d 410 (1989). The petitioner, in failing to oppose the respondents' motion for summary judgment, chose not to protect its rights and did not preserve its remedy for appellate review as to that claim. This lack of opposition operates as a clear statement that the petitioner does not intend to proceed with its due process claims. As a result, the petitioner's claims have been disposed of and there no longer is an actual controversy to adjudicate. *Accord id.* (where party's decision to withdraw claim for declaratory relief rendered controversy moot). Accordingly, the unopposed judgment entered against the petitioner on its due process claims constitutes a sufficient reason for denying review on the first question presented in the petition.

B. The Petitioner's Failure to Raise Below the Issue Set Out in the Second Question Presented in the Petition Precludes Review of that Claim

The second question presented by the Petition faults the Court of Appeals for improperly characterizing the petitioner's due process claim as a takings claim and then denying it as not ripe. As elaborated in Part II of the

petition's Argument, the petitioner presents the claim dismissed by the District Court as not ripe for adjudication under *Williamson*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126, and affirmed by the Court of Appeals, as a due process claim that seeks an alternate recovery based on just compensation. This argument was not presented in the Court of Appeals. Indeed, as reflected in paragraphs four and five of the Statement of Issues Presented for Review submitted by the petitioner to the Court of Appeals, *see* Respondents' Appendix A, the petitioner itself characterized its claim as a Fifth Amendment takings claim, just as it did in arguing against the respondents' motion to dismiss in the District Court. In the Court of Appeals, the petitioner argued that the present case involved a physical takings that was not subject to *Williamson*'s requirement that the plaintiff first seek compensation in the state courts. 56 F.3d at 380. Alternatively, it argued that Connecticut did not recognize a claim for inverse condemnation. *See* Respondents' App. A.

It is only now, for the first time, that the petitioner takes the position that the claim it referred to below as a "physical takings" is really a due process claim which the Court of Appeals improperly treated as a takings claim. It is submitted that the petitioner seeks to recast its claim as a due process claim so as to create a false conflict between the decision of the Court of Appeals in this action and the decisions of other Courts of Appeals in an effort to make its case more certworthy. But the petitioner is constrained by its contrary position in the proceedings below and its failure to raise the issue before the Court of Appeals.

II. THE PETITION IS UNTIMELY

A. The Court's General Practice of Awaiting Final Judgment Before Exercising Certiorari Jurisdiction Warrants Denial of the Petition as to The First Question

The Court of Appeals, in the decision below, reversed the District Court's dismissal of the due process claim and remanded it to the District Court for further proceedings regarding the petitioner's right to the zoning compliance permits alleged to have been withheld. 56 F.3d at 379. "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Virginia Military Institute v. U.S.*, 508 U.S. 946, 113 S.Ct. 2431, 2432, 124 L.Ed.2d 651 (1993) (J. Scalia) (denying certiorari review where Court of Appeals vacated judgment and remanded case to District Court to determine appropriate remedy.) "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328, 88 S.Ct. 437, 19 L.Ed.2d 560 (1967) (per curiam) (den'g cert. to 380 F.2d 570 (C.D.Cir. 1967)). Thus, that portion of the Court of Appeals' opinion remanding the petitioner's claim to the district court was not a final judgment and therefore the first question as presented by the petition was not ripe for review at the time this petition was filed. *Id.*

B. The Petitioner's Failure to Refile Its Petition Within Sixty Days Renders The Petition Untimely.

The amendment of Supreme Court Rule 14.5 to establish a sixty day period for the timely refiling of petitions

that are returned for failure to comply with this Court's rules took effect on October 2, 1995, a month or so after the petitioner's original petition had been returned by the Clerk for failure to comply with Rule 33. At that time, the petitioner had not refiled its petition. Four months later, with the petition still not refiled, the Clerk wrote to petitioner's counsel extending the sixty day deadline to April 13, 1996. The petition was finally refiled in the proper format, and with substantive changes, on April 19, six days after this latter deadline. The petitioner never sought any extension of time for refiling and has provided no explanation for its seven-month delay in refiling. Under either Rule 14.5, as amended, or the extension granted in the Clerk's letter of February 13, 1996, the petition is untimely.

C. The Doctrine of Laches Precludes Certiorari Review

" 'The doctrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights.' " *Kansas v. Colorado*, ___ U.S. ___, 115 S.Ct. 1733, 1742, 131 L.Ed.2d 759 (1995) *quoting* Black's Law Dictionary 875 (6th ed. 1990). "Laches, unlike limitation, is not a mere matter of time, but is principally a question of the inequity of permitting the claim to be enforced – an inequity founded on some change in the conditions or relations of the . . . parties involved." 14 Am.Jur.2d, Certiorari, § 30, p. 807 (1964). Courts will apply the doctrine to bar certiorari review in the proper case, such as where one party allows great expenditures to be made in reliance on the validity of the proceedings and then

attempts to avail itself of certiorari to quash them. *See generally, id.*

The equitable principles of the laches doctrine bars the petitioner from obtaining certiorari review in the case *sub judice.* In the seven months after the Clerk returned the petition, the District Court proceeded to adjudicate the remanded due process claim. It entered discovery deadlines as well as deadlines for the filing of summary judgment motions by all parties. The petitioner never formally sought a stay of the district court proceedings, though it did "suggest" that discovery be held in abeyance while this Court considered its Petition. That suggestion was made without presenting any grounds in support of a stay and at a time when the petition had not been refiled. *See* Respondents' App. D. The District Court decided to proceed with discovery and dispositive motions.

Discovery was ultimately completed in December 1995, with the parties taking a total of five depositions over nine days and engaging in document discovery as well. On January 9, 1996, as required by the District Court's scheduling orders, the defendants filed a summary judgment motion with twenty-one exhibits. The plaintiff did not oppose it and did not controvert the statement of undisputed facts submitted by the defendants. *See* Respondents' App. E. As stated, the district court granted the motion on April 22, 1996, absent any objection, and entered final judgment on May 31, 1996.

Thus, while the plaintiff sat on its rights, the defendants incurred significant expenses in the remanded proceedings based on the Court of Appeals' decision. If the

plaintiff had proceeded timely, by immediately refiling its petition, the district court might have stayed its scheduling order or the scope of the proceedings might have been changed or even narrowed in light of a decision by this Court on the petition. More importantly, if certiorari review is now granted, and the decision of the Court of Appeals is altered at all, such expenditures will be rendered unnecessary and the respondents may very well have to duplicate all their efforts and expenses. Moreover, the petitioner, having failed to oppose summary judgment before, would have a new opportunity to do so. This result would be inequitable in light of the petitioner's delay and the petition should, thererfore, be denied.

III. THERE IS NO CONFLICT CREATED BY THE DECISION BELOW NOR ANY OTHER BASIS FOR REVIEW

A. All the Circuits Require that Section 1983 Takings Claims Satisfy the Second Prong of *Williamson* by First Seeking Compensation From the State

All the Circuits that have addressed the issue require a claimant in a § 1983 takings claim to comply with the second prong of the ripeness test set out in *Williamson*. *See, e.g., Gamble v. Eau Claire County*, 5 F.3d 285 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1096, 127 L.Ed.2d 410 (1994); *Southview Associates Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), *cert. denied sub nom. Southview Associates Ltd. v. Individual Members of Vermont Enviornmental Board*, ___ U.S. ___, 113 S.Ct. 1586, 123 L.Ed.2d 153 (1993); *Miller*

v. Campbell County, 945 F.2d 348, 352 (10th Cir. 1991), *cert. denied*, 502 U.S. 1096, 112 S.Ct. 1174, 117 L.Ed.2d 419 (1992); *Gilbert v. City of Cambridge*, 932 F.2d 51, 65 (1st Cir. 1991), *cert. denied*, 502 U.S. 1096, 112 S.Ct. 192, 116 L.Ed.2d 153 (1992); *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120, 111 S.Ct 1073, 112 L.Ed.2d 1179 (1991); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989). The Sixth Circuit's decision in *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154, 159-60 (6th Cir. 1992), which the petitioner cites, holds this way as well.

This second prong requires a plaintiff to seek compensation through adequate state procedures for obtaining compensation before bringing a § 1983 takings claim. *Williamson*, 473 U.S. at 195; *Southview Associates*, 980 F.2d at 95. The requirement applies to all takings claims, whether asserted under the Fifth Amendment's takings clause or under the Fourteenth Amendment's due process clause. *Id.* The cases cited by the petitioner follow this view as well. *See Eide v. Sarasota County*, 908 F.2d 716; *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d at 159-60; *Landmark Land Co. of Oklahoma v. Buchanan*, 874 F.2d 717 (10th Cir. 1989). Thus, regardless of whether the Court of Appeals below treated petitioner's takings claim as a Fifth Amendment claim or a due process claim, because it asserted a taking of the two units without just compensation, the result – dismissal of the claim as not ripe – is correct and there is no conflict.

Of the opinions cited by the plaintiff, *Bigelow v. Michigan Dept. of Natural Resources*, 970 F.2d 154; *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991); and *Landmark Land Co. of Oklahoma v.*

Buchanan, 874 F.2d 717, deal primarily with the issue of when ripeness requirements apply to procedural due process claims, a question that is not at issue here as the petitioner's due process claim was remanded. Upon remand, the petitioner reasserted its procedural due process claim, *see* Respondents' Appendix C, where it went to summary judgment.

The petition also appears to claim a conflict between *Eide v. Sarasota County*, 908 F.2d 716 and *Southview Associates*, 980 F.2d 84, when in fact, *Southview Associates* expressly approved of and adopted the rationale of *Eide*. 980 F.2d at 96. Finally, the other cases cited by the petitioner, *Unity Ventures v. Lake Country*, 841 F.2d 770, 774 (7th Cir. 1988), *cert. denied*, 488 U.S. 891, 109 S.Ct. 226, 102 L.Ed.2d 216 (1988), and *Taylor Inv. Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1294 (3d Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 304, 126 L.Ed.2d 252 (1993), do not support the petitioner's claim of a conflict with the Second Circuit's affirmance of the dismissal of the plaintiff's takings claim. The petition fails to indicate that certiorari review was denied in these cases as well.

B. The Petitioner Fails to Identify a Conflict Worthy of Review Arising from the Court of Appeals' Requirement that the Petitioner Establish a Protected Property Interest in Order to Prove a Due Process Violation

In arguing for review of the Court of Appeals' decision remanding the petitioner's due process claim, the petition cites to the dissent by Justice Borden of the Connecticut Supreme Court in the case of *Kelly Property*

Development v. Town of Lebanon, 226 Conn. 314, 343-352, 627 A.2d 909, 924-928 (1993) to support its claim of a conflict between the Second, Third and Ninth Circuits in the treatment of property rights under the Due Process Clause. It does not state the nature of the conflict, or why the conflict is important enough to merit review by this court. Moreover, contrary to the claim made in the petition, the Ninth Circuit has applied an entitlement inquiry to due process claims. *See, e.g., Cassidy v. State of Hawaii*, 915 F.2d 538 (9th Cir. 1990); *Storek v. Storek, Inc. v. Port of Oakland*, 869 F.2d 1322 (9th Cir. 1989). The petition also fails to mention that other circuits also apply the entitlement test to property interests implicated in due process claims. *See, e.g., Gardner v. City of Baltimore*, 969 F.2d 63, 69 (4th Cir. 1992); *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir. 1991); *Polenz v. Parrot*, 883 F.2d 551, 556 (7th Cir. 1989); *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989); *Carolan v. City of Kansas City*, 813 F.2d 178 (8th Cir. 1986). The petition thus fails to fully present this issue and it should not, therefore, be reviewed.

Furthermore, the initial showing of a protected right or interest in due process claims alleging a denial of a property use or permit, as applied by the Second Circuit, *see, e.g., Walz v. Town of Smithtown*, 48 F.3d 162 (2d Cir. 1995), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2557, 132 L.Ed.2d 810 (1995); *RRI Realty Corp. v. Inc. Village of Southampton*, 870 F.2d 911, 912 (2d Cir.), *cert. denied*, 493 U.S. 893 110 S.Ct. 240, 107 L.Ed.2d 191 (1989), simply follows and implements the due process principles set by this Court. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). Indeed, contrary to the

petitioner's argument that such an inquiry affords real property rights a lesser level of protection from adverse state action, this inquiry is applied to all types of claims brought under the Due Process Clause. *See Landmark Land Co. of Oklahoma v. Buchanan*, 874 F.2d at 723 (and cases cited therein.) By contending that such an inquiry should not apply in land use cases alleging a due process claim, the petitioner is actually seeking to raise real property rights to a higher plane than other rights protected under the Constitution.

Furthermore, the opinion below does not conflict with this court's decision in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), which, unlike the present case, was an appeal from a state court decision and not a § 1983 case. The petitioner does not challenge the requirement in the special permit that two units be dedicated as moderate income housing. It challenges the withholding of the zoning compliance permits on the alleged grounds that it had to convey those moderate income units to the Town, an issue that raises the question of whether it had a property interest in the permits sought. This issue was not addressed in *Dolan*.

IV. THE COURT OF APPEALS' DECISION ACHIEVED A CORRECT AND FAIR RESULT

A. The Plaintiff's Execution of the Agreement to Convey the Two Units to the Town Precludes It From Satisfying the First, or Finality, Prong of *Williamson*.

The first prong of the *Williamson* ripeness test "requires the government entity in charge of enforcing

the regulations at issue to have rendered a 'final decision' ". *Southview Associates v. Bongartz*, 980 F.2d at 95 *quoting Williamson*, 473 U.S. at 186, 105 S.Ct. at 3116. The plaintiff's decision in 1988 to agree to the conveyance of the two units rather than to contest the allegedly unconstitutional requirement through available state procedures precludes it from now satisfying this first prong. The defendants argued this point below although it was never addressed by the Court of Appeals.

Such a finding is justified here where the property owner, five years after striking the agreement with the local government, attempts to use a § 1983 action to obtain more than it earlier had agreed to. A contrary holding would allow property owners who propose development projects to negotiate an agreement with zoning officials, proceed with development plans often encompassing concessions obtained during such negotiations to which the developer would not otherwise have a right and then, after completing the development, bring a § 1983 action to contest the negotiated result. Such an outcome, rather than achieving the desirable objective of finality, would subject the entire development process to subsequent revision by the federal courts. Hence, the petitioner, having failed to contest the alleged unconstitutional actions of the defendants and having chosen instead to compromise, should be deemed to have waived its right to contest that conduct. Thus, the affirmance of the dismissal of the takings claim by the Court of Appeals can, and should be, upheld on the additional ground that the plaintiff cannot satisfy the first, or final decision, requirement of the *Williamson* ripeness test.

B. The Outcome Achieved by the Decision of the Court of Appeals in This Case is a Fair One.

The respondents acknowledge that various legal commentators have called for clarification of the *Williamson* ripeness standard as applied to land use cases invoking takings and due process claims. *See, e.g.*, Michael Berger, *The "Ripeness" Mess*, 1991 Institute on Planning, Zoning and Eminent Domain, § 7.02[1]. Despite the petitioner's attempt to portray this matter as the ideal case for that purpose, it is not such a case. The factual record of this case on appeal, limited as it is to the allegations of the complaint, is incomplete and indeed inaccurate, as established by the respondents' uncontroverted statement of facts in support of the summary judgment motion on remand. The claims are not precisely set forth, but are pleaded with a lack of clarity and were argued inconsistenly by the petitioner in the proceedings below. Furthermore, the current posture of the case does not warrant the devotion of this court's resources to a review of this case at this juncture.

The results are fair in any event. As established by the respondents on remand, the petitioner, which at the time was made up of three principalls, voluntarily and of its own initiative invoked the provisions of the Town's moderate income housing regulations in order to increase the density of its proposed condominium development. In its proposal, the petitioner agreed to convey the units to be designated for moderate income use to a nonprofit corporation. The Town acted on the petitioner's application and, in approving five more units than the developer was entitled to under the normal zoning for the property,

gave the petitioner's predecessor the maximum number of additional units permitted by the moderate income housing regulations. Thus, the petitoner, by dedicating the two units in return for a net addition of three units, obtained compensation from the start. *Accord* Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J.Land Use & Envtl.L. 37, 52 (Fall 1995) ("[T]he substantive rules of takings law make it clear that property owners who seek to maximize the development potential of their land run a very real risk of losing on the merits.")

The Town also incorporated into the special permit the requirement of conveyance of the two units to the nonprofit agency, to be established by the petitioner as outlined in its proposal. As construction proceeded, however, the petitioner failed to establish the nonprofit corporation in accordance with its proposal and the special permit. Instead, it sought to change the structure of the nonprofit corporation as approved in the special permit from one that included a board member not associated with the petitioner, to one comprised solely of one of the petitioner's principals and his associates. Because the proposed change would leave the nonprofit without an independent board member, the Town refused the proposed change. While the failure of the petitioner to resolve this issue precluded the issuance of zoning compliance permits by the Town as to the two moderate income units, the Town did issue such permits for other units in the development while it worked with the petitioner to resolve the problem of how to administer the moderate income units. Finally, in 1988, the petitioner, over the objections of one of its three principals, offered

to convey the two units to the Town as a way of resolving this issue. The Town agreed and the resolution was memorialized in a writing executed in July 1988. The units were conveyed to the Town and indeed were then resold, with an error occurring in the reconveyance of one of the units. Sometime thereafter, the principal who had objected to the July 1988 agreement with the Town bought out the interests of the other two principals and instituted the present action.

The respondents are aware that the foregoing facts are not part of the record on appeal. They are included here because these facts, undisputed and uncontroverted, are now part of the record on remand. It is noted that the petitioner, in refiling its petition, has failed to apprise this court of the subsequent proceedings on remand. The respondents believe that this Court should be informed that the petitioner did not contest these facts. They are now deemed admissions by the petitioner and clearly show that no unfairness has resulted from the decisions of the Court of Appeals and the District Court, yet another reason for denying certiorari review.

C. Overruling the Court of Appeals' Decision Would Produce Undesirable Results.

The ripeness analysis established in *Williamson* and followed by the Court of Appeals serves the legitimate and necessary function of preventing the federal courts from becoming enmeshed in land use disputes which are more appropriately resolved at the local and state level. *See Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) ("The Supreme Court has erected imposing

barriers . . . to guard against the federal courts becoming the Grand Mufti of local zoning boards.") The petition essentially seeks a reversal of the *Williamson* ripeness requirements. Such a result would inundate federal courts with land use cases seeking compensation for alleged takings contrary to the long held view that they belong in state courts, which are better equipped to evaluate them.

Likewise, the inquiry in due process claims as to whether the claimant has a protected property interest, as applied by the Second Circuit in *RRI Realty Corp. v. Inc. Village of Southampton*, 870 F.2d 911, 912 (2d Cir.), *cert. denied*, 493 U.S. 893, 110 S.Ct. 240, 107 L.Ed.2d 191 (1989) and *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 60 (2d Cir. 1985) serves a similar function with alleged violations of the Fourteenth Amendment, by ensuring that federal courts are devoting their scarce resources to valid federal claims.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari filed by the Petitioner Villager Pond, Inc., should be denied.

Respectfully Submitted,

THE RESPONDENTS

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APPENDIX A

94-7564

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VILLAGER POND, INC.
PLAINTIFF-APPELLANT

V.

TOWN OF DARIEN
DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLANT

COUNSEL FOR APPELLANT:
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* * *

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the definition of property interest per *RRI Realty* is still valid in light of the United States Supreme Court's recent decision in *Dolan v. City of Tigard*.

2. Whether, even under the *RRI Realty* analysis, the District Court erred in holding that the plaintiff did not have a "property interest" in a special permit that had already been granted.

3. Whether the District Court erred in holding that the allegations of the plaintiff's complaint failed to state a claim upon which relief could be granted for the reason that the complaint failed to specifically allege that the plaintiff had a "property interest" in the special permit.

4. Whether the District Court erred in holding that the *Williamson* test for ripeness applies where a municipality has effected a physical takings of property.

5. Whether the District Court erred in holding that, under Connecticut state law, the plaintiff had a reasonable and adequate remedy for a takings that would provide it with just compensation within the meaning of the Fifth Amendment.

* * *

APPENDIX B

ARTICLE IV – RESIDENTIAL ZONE REGULATIONS

SECTION 400. R-2, R-1, R-1/2, R-1/3 and R-1/5 RESIDENTIAL ZONES

401. Background and Purposes

These zones are intended to provide for single-family dwellings and accessory uses thereto, to be located on individual lots of minimum specified area in such a way as to preserve the natural beauty and to maintain the health, safety and general welfare of the Town.

It is further the intent of these Regulations to preserve and enhance the well-established residential character of the Town by carefully controlling certain permitted non-residential principal and accessory uses within these zones.

402. Permitted Principal Uses

The following uses shall be permitted subject to approval of a Zoning Permit in accordance with Subsection 1102:

a. A single, detached one-family dwelling on its own lot.

b. Public schools and public parks.

c. Private open space reservations, wildlife sanctuaries, flood protection and conservation areas, where the foregoing are retained in a natural and undeveloped condition without buildings of any kind.

403. Permitted Accessory Uses

The following accessory uses shall be permitted. Approval of a Zoning Permit in accordance with Subsection 1102 shall be required for uses indicated by an asterisk:

a. Home occupations subject to the following conditions:

(1) No person, other than those residing in the dwelling, may be employed at, or conduct business on, the premises;

(2) The accessory use shall not be noticeable from the exterior of the building or change the exterior appearance of the residential character of the building and shall not have any signs, outside storage, or parking of commercial vehicles;

(3) The interior floor area devoted to a home occupation shall not exceed 25 percent of the gross square footage of the dwelling, including any storage or other area supplementary to such home occupation;

(4) The accessory use shall not create any electrical, radio, television or similar interference.

(5) Except for individual students arriving for the purpose of receiving instruction in academic disciplines or the arts, the accessory use shall not involve patrons, clients or associates coming to the premises or the generation of additional deliveries, traffic or parking.

b. Keeping of not more than three non-transient roomers or boarders in any dwelling, providing no sign shall be displayed and no separate cooking facilities shall be maintained in connection with such accessory use.

c. Parking of passenger vehicles and parking of not more than one commercial vehicle not exceeding 3/4 ton capacity, when used in connection with a permitted use, and when stored in a garage.

d.* Private garden house, tool house, greenhouse, playhouse, or similar private accessory use, not used for commercial purposes, when used in connection with a permitted use.

e.* Docks, landings and boathouses. Such structures shall not accommodate more than two wet slips or moorings and shall be exempt from rear yard setback requirements. No boat shall be occupied or used for living or sleeping quarters.

f.* Swimming pools subject to the requirements of Subsection 364.

g. Farming, as defined in these Regulations, but not including any sale of products on the premises.

h. Off-street parking as per Section 900.

i.* Signs pertaining to a permitted use on a lot, as per Section 920.

j.* Any other accessory building or use customarily incidental to a permitted use.

k. Not more than three recreational vehicles, as defined in these Regulations, provided such shall be:

(1) Parked or stored at all times in a fully enclosed structure, or if parked outdoors, located to the rear of the front line of any existing dwelling or other principal building on the same lot, and not within any required accessory building yard space;

(2) Effectively screened from view of adjacent premises to the satisfaction of the ZEO, where stored outdoors;

(3) Not used for living, recreation or business purposes while parked or stored on a residential lot;

(4) Directly owned or leased by the owner or tenant of the premises on which they are stored.

l. Tag sales, subject to provisions of the Town Code of Ordinances.

404. Principal Uses Requiring Special Permits

The following uses shall be permitted subject to approval of a Special Permit in accordance with Section 1000:

a. Private schools.

b. Nursery schools.

c. Churches and other places of worship intended primarily to serve religious needs of the local community.

A columbarium located on church grounds and used solely to contain the remains of deceased persons who have been cremated shall be recognized as a normal church accessory use.

d. Social, cultural and recreational uses, serving a community need or convenience, and not including any activity carried on primarily for profit.

e. Municipal buildings and uses of the Town of Darien, and other governmental uses intended primarily to serve the needs of the local community.

f. Electric transformer stations, telephone exchanges for local service only and water, sewer or natural gas pumping stations or facilities provided the floor area shall not exceed 300 square feet and no yard or building shall be used for storage.

g. Railways, but not including switching, storage or yards, industrial sidings, repair or service facilities.

h. Nurseries limited to the growing of nursery vegetation, but not including commercial greenhouses.

i. Convents and monasteries of religious orders. As an accessory use to such permitted facility, the Commission may permit the providing of overnight accommodations for not more than ten guests on the premises at any one time when such guests are attending for a religious purpose or retreat.

j. Protected Town Landmarks, in accordance with the provisions of Subsection 1041.

405. Accessory Uses Requiring Special Permits

The following accessory uses shall be permitted subject to approval of a Special Permit in accordance with Section 1000:

a. The professional office of a physician, dentist, engineer, attorney, architect, accountant, artist, musician, tutor or similar professional person when conducted by the owner of the dwelling or a home occupation involving some patron, client or associate visits to the premises may be permitted by Special Permit as an accessory use in a dwelling subject to the following conditions:

(1) Not more than one non-resident person shall be employed on the premises.

(2) The accessory use shall not be noticeable from the exterior of the building or change the exterior appearance of the residential character of the building, except for a permitted sign, and shall not have any outside storage or parking of commercial vehicles. No parking spaces shall be located within the required front yard.

(3) The accessory use shall not create any electrical, radio, television or similar interferences.

(4) The accessory use shall permit occasional visits by clients, patrons and/or associates (generally not more than a total of six visits per day) to render or receive services. No use shall include the delivery or sale of tangible products, other than documents.

(5) The interior floor area devoted to such accessory use shall not exceed 25 percent of the gross square footage of the first floor of the dwelling including any storage area supplementary to such use.

(6) Any of the above professions or uses that are, or shall become, more intensive than permitted in the residential zone shall only be permitted in the appropriate non-residential zone. The following uses are, by their inherent nature and intensity, not appropriate or permitted uses in residential zones: barber shops, beauty parlors, animal hospitals, dance studios, real estate offices, mortuaries, restaurants, stables, kennels, metal working, automobile, boat or other vehicle repair or painting, and other uses as may be determined by the ZEO.

b. Outdoor recreational uses and tennis courts. The lighting or illumination of recreational facilities is permitted provided that such lighting shall create no hazard or nuisance upon adjacent properties with reference to the following standards:

(1) The source of such lights shall be concealed from surrounding residential properties;

(2) All lighting shall be located and be of such design that no illumination shall be directed toward surrounding residential properties;

(3) No lighting facilities shall be mounted at a height greater than 20 feet above grade.

c. Windmills and similar energy conservation systems that utilize the power of the wind provided:

(1) Each lot shall have a minimum area of 40,000 square feet or as required by the applicable zone, whichever is greater;

(2) No windmill or similar structure shall exceed 50 feet in height;

(3) No windmill or similar structure shall be located in any required yard;

(4) The windmill or similar structure shall be set back from all lot lines and from the principal building a distance of at least equal to the height of the windmill or similar structure.

d. Ground-mounted solar panels and satellite receiving dishes or dish-type antennae provided they:

(1) Shall not exceed 15 feet in height or diameter, including all supporting structures;

(2) Shall not be located within any required front yard for a principal structure;

(3) Shall be fully screened from any adjacent property line and the street line;

(4) Shall be permanently anchored in compliance with the State Building Code; and

(5) Technical literature shall be submitted to supplement any proposed application for the above.

e. Living accommodation or dwelling unit in conjunction with a Special Permit use where

the applicant clearly demonstrates a reasonable safety, security or similar need to have an employee reside on the premises.

ARTICLE V – DESIGNED BUSINESS AND RESIDENTIAL AND PARKING ZONES

SECTION 500. DESIGNED BUSINESS AND RESIDENTIAL ZONE (DBR)

501. Background and Purposes

This district is an overlay zone which, in addition to permitted uses and controls of the underlying zone, also permits additional uses subject to special provisions and is composed of the Designed Business One (DB-1) and Designed Business Two (DB-2) Zones together with associated residentially-zoned areas as shown on the Town Zoning Map. The district is a transitional zone between the Central Business District and the lower density residential districts on the periphery of that center and provides for the construction of residential dwellings as an alternative form of development to that which is still permitted in the DB-1 and DB-2 Zones. The public interest is to provide a desirable alternative to presently permitted commercial uses within the DB-1 and DB-2 portions of this zone, to provide a broader choice of housing types in Darien, and to preserve the residential character of Darien. This zone permits the establishment of multi-family housing units that will serve the housing needs of persons who desire this form of housing with its associated conveniences and advantages, and will also meet certain social needs and requirements within the community. In particular, the DBR district is intended to provide a diverse range of housing alternatives with senior and

moderate income housing being specifically encouraged.

502 Site Required to be Served by Public Water and Public Sewerage Facilities

To qualify for development under these DBR regulations, a site shall be served by public water and public sewerage facilities of sufficient capacity for the proposed development.

503 Principal Uses Requiring Special Permits

The following uses shall be permitted subject to approval of a Special Permit in accordance with Section 1000 and the standards set forth below:

a. Multi-family dwellings.

b. Related accessory buildings, structures and uses.

504 Area and Bulk Requirements

The following requirements shall be deemed to be the minimum or maximum requirements in every instance of their application. Dimensions are in feet unless otherwise indicated.

1. Minimum Lot Area ..... 2 acres (87,120 sq. ft.)
2. Minimum Lot Frontage .... 150 (see Note a)
3. Minimum Lot Width (Average) 250
4. Minimum Lot Depth (Average) 200
5. Average Floor Area of All Dwelling Units ..... 1200 sq. ft.

6.	Minimum Floor Area of Dwelling Units	600 sq. ft.
7.	Minimum Front Yard	30
8.	Minimum Side Yard	25
9.	Minimum Rear Yard	25 (see Note b)
10.	Maximum Height	2½ stories or 28 ft. (see Note c)
11.	Maximum Building Coverage	20% (see Note d)
12.	Maximum Floor Area Ratio (Subsection 515)	0.30 (0.12 offices + 0.18 multi-family)
13.	Maximum Building Size	8000 sq. ft.
14.	Maximum Dwelling Units/ Building	10

		Standard	Senior Housing Incentive	Moderate Income Incentive
15.	Maximum Density			
	Dwellings Units/Gross Acre	8	12	+ 40% over standard
	Bedrooms/ Gross Acre	16	18	+ 40% over standard

Notes:

a. Frontage shall be on either Boston Post Road, Old Kings Highway North or Leroy Avenue.

b. If located within 100 feet of any residential zone, a 50 foot minimum rear yard shall be required.

c. Occupancy shall be limited to two stories.

d. May be increased to 25% to permit senior housing or moderate income housing incentives. Total coverage of the site including accessory buildings, parking and other paved areas, terraces and pedestrian sidewalks shall not exceed 50% of the site area.

505 Density

505.1 Modification – Significant wetlands and areas of steep slopes of 15 percent or greater grade may be identified by the Commission and excluded from the gross land area computation. The Commission may increase the maximum density and modify the coverage requirements hereunder pursuant to Subsections 506.1 and 506.2.

505.2 Bedrooms – At least 30 percent of the total number of units shall be limited to one bedroom.

505.3 Maximum Total – The total number of dwelling units, including maximum unit density and bonus units, shall not exceed 60 dwelling units on any DBR site. The total number of bedrooms, including maximum bedroom density and bonus bedrooms, shall not exceed two times the maximum total number of permitted dwelling units on any DBR site.

506 Density Incentive

506.1 Senior Housing Incentive – If the applicant agrees to limit occupancy of all dwelling units to families of which at least one person is age 62 or over, then the Commission

may permit the applicant to develop a maximum density of 12 units and 18 bedrooms per gross acre. Title to the Senior Housing Incentive Units shall be restricted so that in the event of any resale by the owner or any successor, the property shall remain restricted to occupancy by at least one person age 62 or over.

506.2 Moderate Income Housing Incentive – Permitted density may be increased by not more than 40 percent if at least 40 percent of the additional density units are established as moderate income dwelling units. This incentive is an alternative to and not in addition to the Senior Housing Incentive above. The Commission may limit this increase in density where the Commission determines that such may be necessary or appropriate because of the specific characteristics of the individual site. The Commission may waive the recreational requirement of Subsection 509.b where the Commission finds that such waiver will encourage moderate income housing units. Additional criteria for moderate income housing incentives are set forth in Subsection 513.

507 Buffer

Any internal road, parking area or accessory structure for multiple or community use within 100 feet of any residential single-family zone shall be screened from view during all seasons of the year. No swimming pool, tennis court, paddle tennis court or other open recreational facility shall be located within 100 feet of any residential single-

family zone and shall be screened in accordance with the requirements of Section 940.

508 Building Separation

A building wall with windows shall be at least 20 feet from any opposing wall that does not have windows and at least 50 feet from any opposing wall that does have windows.

* * *

e. The design of the development and the placement of buildings, driveways, walkways, parking facilities and other improvements shall be such that existing trees, water courses, rock outcrops and similar natural features are preserved to the greatest possible extent.

512 Parking, Drives and Garages

a. Number of Off-Street Spaces – 2½ spaces per dwelling unit including at least one single-car enclosed garage and one additional parking space excluding garage aprons provided for each dwelling unit. A minimum of one-half space per unit shall be designated as visitor parking.

b. Parking spaces and driveways shall not be located in any required buffer or yard areas.

c. Outside parking spaces shall be at least 10 feet from any dwelling unit within the development and adequately screened from adjoining residential uses.

d. No portion of any such parking area shall be more than 200 feet from the entrance of any unit served thereby.

e. Not more than 10 continuous spaces shall be built along an access driveway or parking lot without being separated by a landscaped area of at least six feet in width.

f. Driveways shall generally have a width of 24 feet. Primary access shall only be to Boston Post Road, Old Kings Highway North, or Leroy Avenue. On corner lots, secondary access may be permitted on side streets.

g. Pedestrian walkways, a minimum of three feet in width, shall be provided between buildings and between buildings and public highways in a system so as to discourage the use of driveways for pedestrian use. A sidewalk along a public street shall be constructed or reconstructed by applicant.

513 Moderate Income Housing Incentive

513.1 Criteria for Moderate Income Dwelling Units

a. Moderate income units shall be available for sale, resale or continuing rental only to moderate income families as defined in Subsection 513.2. Such units shall be physically integrated and dispersed into the design of the development. Moderate Income Units shall be distributed among one, two or three bedroom units in the same proportion as all other units on the site unless a different proportion is approved by the Commission as being better related to current or projected housing needs.

b. Selection of Moderate Income Families – moderate income families applying for

moderate income dwelling units shall be selected on the basis of the following categories of priority:

(1) Town of Darien municipal employees including Town of Darien Board of Education employees; and also volunteer firemen on the active roster of a volunteer company in the Town of Darien;

(2) Other residents of the Town of Darien;

(3) Other persons employed in the Town;

(4) Residents of Fairfield County;

(5) All others.

The Department of Social Services may maintain a list of eligible moderate income families. Where the number of eligible moderate income families in the same priority classification exceeds the number of available units, the applicants shall be selected by lottery.

c. Selection priorities – within each of these categories, applicant shall be selected according to the following priorities:

(1) Families of which the head of the household or spouse is 62 years or older;

(2) Families of which the head or spouse is handicapped (certified by a physician).

d. Maximum Rent and Sales Price – the maximum monthly rent for a moderate

income dwelling unit excluding utilities (gas, oil and electricity) and common charges shall not exceed two percent of the median annual Town-paid wages of all full time employees and teachers during the preceding calendar year. The maximum sales price for a moderate income dwelling unit shall not exceed 3½ times the median annual Town-paid wages of all full time Town employees, including Board of Education employees, during the preceding calendar year. There shall be no extra charge for minimum required facilities such as, but not limited to, parking and recreational facilities other than common charges applicable to all dwelling units.

e. Resale Restrictions – in the case of moderate income dwelling units, the title to said property shall be restricted so that in the event of any resale by the owner or any successor, the resale price shall not exceed the then maximum sales price of said unit as determined in accordance with Subsection 513.1 (d) above, plus the cost of any fixed improvements made by the owners.

f. The Commission may require additional assurances, including deed restrictions, to ensure the continuing eligibility of tenants and continuing restrictions on use to eligible moderate income families.

g. Leasing and Subleasing – Moderate income units may be occupied only by the owner and his or her immediate family, qualified according to Subsection

513.1(b), except that any unit not owner occupied may be rented only if tenant qualifies according to Subsection 513.1(b).

513.2 Definition of Moderate Income Families

Families whose aggregate income, including the total of all current annual income of all family members from any source whatsoever at the time of application (including a reasonable amount attributable to ownership of any residence which will be vacated, but excluding the earnings of working minors attending school full-time), averaged for the preceding two years, shall not exceed the following multiple of median annual Town-paid wages of full-time employees of the Town, including Board of Education employees, during the preceding calendar year.

Family Size	Multiple
1 person family	0.9
2 person family	1.3
3 person family	1.4
4 person family	1.5
5 person family	1.6

514 Darien Housing Authority Special Permit Regulations

514.1 Background and Purposes

The rights, duties, privileges and obligations of these Special Permit Regulations shall be

limited to the Darien Housing Authority only, in order to provide "Housing for Elderly Persons" under Section 8-112A, *et seq.* of the General Statutes.

514.2 Permitted Uses

The applicability of this Special Permit Section is also limited to land now or in the future owned by the Town or the Darien Housing Authority within the DBR Zone. All of the regulations of the DBR Zone shall apply to applications by the Darien Housing Authority except, the Commission may, provided it shall make all findings under Section 1000, in its discretion, grant a Special Permit modifying the following requirements:

a. Setback requirements by not more than 25 percent.

* * *

ARTICLE XI – ADMINISTRATION, ENFORCEMENT AND MISCELLANEOUS

SECTION 1100. ZONING ENFORCEMENT

1101 Authority

a. No board, agency, officer or employee of the Town shall issue, grant, or approve any permit, license, certificate, or other authorization, including Special Permits by the Commission, and variances by the ZBA, for any construction, reconstruction, alteration, enlargement or moving of any building, or for any use of land or building that would not be in full compliance with the

provisions of these Regulations. Any such permit, license, certificate or other authorization, issued, granted or approved in violation of the provisions of these Regulations shall be null and void and of no effect without the necessity of any proceedings or revocation or nullification thereof, and any work undertaken or use established pursuant to any permit, license or certificate or authorization shall be unlawful, and no action shall be taken by any board, agency, officer or employee of the Town purporting to validate any such violation.

b. These Regulations shall be enforced by the ZEO in accordance with the provisions of these Regulations.

1102 Zoning Permits

a. No building or structure shall be erected, enlarged, structurally altered, demolished, moved or removed, wholly or partly, no use of land shall be undertaken, and no excavation for any building, structure or use shall be made, until a permit therefor shall have been issued by the ZEO. Except upon a written authorization of the ZBA, or except as provided in Subsection 385, no such Zoning Permit or Certificate of Zoning Compliance shall be issued for any building where such construction, addition, alteration, moving or use thereof shall not be in full compliance with the specific provisions of these Regulations.

b. A Zoning Permit shall be valid for a period of one year only. The ZEO may extend the permit for one additional year, provided

substantial work has been done during the period.

c. There shall be submitted with all applications for Zoning Permits three copies of a layout or plot plan drawn to scale, showing the actual shape and dimensions of the lot to be built upon, the exact size and location on the lot of the building and accessory building existing, and the lines within which the building or structure shall be erected or altered, the existing and intended use of each building, or part thereof, the number of families or housekeeping units that a building shall be designed to accommodate, and such other information with regard to the lot and neighboring lots that may be necessary to determine and provide for the enforcement of these Regulations. One copy of such plan shall be returned to the owner when such plans have been approved by the ZEO.

d. Upon the completion of the foundation for any building, addition to a building, or a structure for which a Zoning Permit shall have been issued, certification by a licensed Land Surveyor or registered Professional Engineer shall be filed by the holder of the Zoning Permit with the ZEO, which certificate shall state that the location of the foundation is in compliance with these Regulations.

1103 Certificate of Zoning Compliance

a. It shall be unlawful for an owner to use or permit the use of any building or premises, or part thereof, hereafter created, erected,

changed, converted or enlarged, wholly or partly, in its use or structure, until a Certificate of Zoning Compliance shall have been issued by the ZEO. Such Certificate shall state that such building or premises, or part thereof, and the proposed use thereof, are in complete conformity with the provisions of these Regulations. It shall be the duty of the ZEO to issue a Certificate of Zoning Compliance within ten working days after completion of improvements authorized by the Zoning Permit application, provided that he is satisfied that the building and the proposed use of the building or premises conform with all the requirements herein set forth.

b. Under such rules and regulations as may be established by the Commission, a temporary Certificate of Zoning Compliance for part of a building may be issued for a period not to exceed three months.

c. No non-conforming use shall be changed, or extended, without a Certificate of Zoning Compliance having first been issued by the ZEO therefor.

d. A Certificate of Zoning Compliance shall be deemed to authorize, and shall be required for, both initial and continued occupancy and use of the building or land to which it applies, and shall continue in effect as long as such building and the use thereof, or of such land, shall be in full conformity with the provisions of these Regulations and any requirements made pursuant thereto.

e. The ZEO shall maintain a record for all Certificates of Zoning Compliance, and copies shall be furnished, upon request, to any person having a proprietary or tenancy interest in the building affected. Upon written request from the owner, the ZEO shall issue a Certificate of Zoning Compliance for any building or premises existing at the time of the enactment of these Regulations, certifying, after inspection, that the extent and kind of use and disposition conforms with the provisions of these Regulations.

APPENDIX C

C1

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VILLAGER POND Plaintiff,	)	CIVIL ACTION NO. 3:93CV712 (PCD)
VS.	)	DECEMBER 1, 1995
TOWN OF DARIEN, ET AL Defendant.	)	

PLAINTIFF'S MORE SPECIFIC STATEMENT

The plaintiff hereby files its more specific statement addressing the request which had been held in abeyance pending the resolution of other issues which was made in the alternative in the defendants' Motion to Dismiss dated May 21, 1993.

As to Paragraph 1 of the More Specific Statements:

Paragraph 24 is hereby added to the complaint: The above-actions of the defendants' proximately caused damages to the plaintiff including lost rent on the two units which were extorted, the lost fair market value of the units or, in the alternative, the lost fair market value of the unit that was transferred without deed restriction and for the unit that was transferred with deed restriction damages based on the value of the unit at the moderate income unit and, furthermore, damages proximately caused involving additional legal fees, delay, and punitive damages including attorney's fees and attorney's fees under 14 U.S.C. Section 1983, *et. seq.*

As to Paragraph 2 of the More Specific Statements:

The policies of the Town of Darien include a pattern of off-the-record bargaining using the possibility of denial in order to exact deals from applicants including exaction of real property and conservation easements to other entities and to the Town as a condition of both wetlands and zoning approval, the acceptance of property conveyances from developers either to the Town or to Conservation Trusts while other approvals are in the planning stages or in application to grease the approval skids, the threat of such exactions some of which the local regulations purport to authorize, as early as the 1970s as reflected in Practice Book Supplemental Form 106.12 being a lawsuit against the Town of Darien for the extortion practices and in this case, entertaining a proposal by one of the members of the Planning and Zoning Commission (Edmund Schmidt as reflected in RTM Minutes) that title to the units put in the name of a corporation that he purposes to form and manage, acceptance of title to the units by the RTM which is the body under the Town Charter which is authorized to acquire and convey real estate, illegal criteria in Section 513 of the Zoning Regulations which favored town employees and other Darien connected groups illegally favoring them for purchase or occupancy of the units, favorable treatment of the politically connected client of Edmund Schmidt and his wife Georgia Von Schmidt for acquisition of one the units.

As to Paragraph 3 of the More Specific Statements:

The allegations regarding Jane Branigan and her position as moderator of the RTM are based on the fact

that she ran the entity in town government, the Representative Town Meeting, which is authorized under the Charter to acquire and convey real estate which, being the legislative body and final determiner of policies, ratified the activities of the Planning and Zoning Commission members, the Town of Darien in general, the Board of Selectmen in particular, by approving the acquisition and disposition of the units as well as the timing of the disposition of one of the units so that Section 513 was deleted from the Zoning Regulations and the Town could convey the units without any deed restrictions.

As to Paragraph 4 of the More Specific Statements:

The Second Count, Paragraph 24, is hereby modified to delete the words "and procedural" from the Second Count and in accordance with the request, the plaintiff hereby adds a Third Count sounding in procedural due process:

THIRD COUNT:

1. -25. Paragraphs 1 through 25 of the Second Count are hereby made Paragraphs 1 through 25 of this the Third Count as though fully set forth herein.

26. The defendants acting under color of state law deprived the plaintiff of its property and proximately caused the damages described to the plaintiff by denying the plaintiff procedural due process under the Fifth and Fourteenth Amendments of the U.S. Constitution in one or more of the following ways, in the alternative:

(a) They threatened withholding of further zoning approvals such as certificates of zoning

compliance and certificates of occupancy, done in such a way as to threaten the economic viability of the project to exact concessions in property from the plaintiff.

(b) The retroactive attempt to modify the conditions of the special permit and the vested rights set forth therein without notice and in violation of the statutory and zoning regulations.

(c) By taking the profits from its extortion and putting them in the general fund with no notice or opportunity for the plaintiff to be heard including the conveyance of one of the units without any deed restrictions and the removal, retroactively, of the invalid ordinance Section 513 from the Zoning Regulations effectively making the Second units free and clear of moderate income restrictions which had been imposed upon the plaintiff.

27. These actions proximately caused damages to the plaintiff including legal fees and costs of delay, the fair market value of the units lost, delay damages, and the actions were so flagrant that the court should award punitive damages and such other and further equitable relief as the court may deem appropriate.

Respectfully submitted,
THE PLAINTIFF
Villager Pond,

BY: /s/ Ridgely W. Brown

Ridgely W. Brown
Brown & Brown
P.O. Box 1205
Darien, CT 06820
(203) 655-8880
Fed. Bar No. CT06765

CERTIFICATION

I hereby certify that a copy of the foregoing has been mailed and faxed on this date to all counsel and pro se parties of record as follows: John Wayne Fox, Esq., Curtis, Brinckerhoff & Barrett, 666 Summer Street, Stamford, CT 06901.

/s/ Ridgely W. Brown
Ridgely W. Brown

APPENDIX D

D1

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VILLAGER POND Plaintiff,	)	CIVIL ACTION NO. 3:93CV712(PCD)
VS.	)	
TOWN OF DARIEN, ET AL Defendant.	)	SEPTEMBER 19, 1995

MOTION FOR CLARIFICATION OF DISCOVERY ORDERS AND OBJECTION TO DEFENDANTS' DISCOVERY

(Filed Sep. 21, 1995)

The plaintiff hereby moves for clarification of discovery orders and objects to the request for admissions production requests and the depositions scheduled by the defendants.

The parties met with a Special Master subsequent to the remand of this case from the Second Circuit and the Special Master indicated that discovery would continue if a Petition for Certification to the U.S. Supreme Court were not filed. Such a petition has been filed by the plaintiff.

The plaintiff suggests that discovery be held in abeyance until the Supreme Court acts on the Petition for Certification.

Respectfully Submitted,

THE PLAINTIFF,
Villager Pond,

BY: /s/ Ridgely W. Brown
Ridgely W. Brown
Brown & Brown
P.O. Box 1205
Darien, CT 06820
(203) 655-8880
Fed. Bar No. CT06765

CERTIFICATION

I hereby certify that a copy of the foregoing has been mailed and faxed on this date to all counsel and pro se parties of record as follows: John Wayne Fox, Esq., Curtis, Brinckerhoff & Barrett, 666 Summer Street, Stamford, CT 06901.

/s/ Ridgely W. Brown
Ridgely W. Brown

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VILLAGER POND, INC., Plaintiff v. TOWN OF DARIEN, et al. Defendants	Docket No. 3:93cv0712(PCD) January 8, 1996

THE DEFENDANTS' STATEMENT OF UNDISPUTED FACTS SUBMITTED IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

E.S.P. Associates was a partnership whose partners were Rodney Eilson, Paul Pacifico and Paul Siladi, Jr.

The plaintiff, Villager Pond, Inc., is the successor-in-interest to E.S.P. Associates. (As used in this statement, the term plaintiff refers to both E.S.P. and Villager Pond Inc.)

Rodney Eilson is an attorney and, at the time of the transactions at issue in this case, a former judge of the Connecticut Superior Court.

Paul Pacifico was and is an attorney practicing law in the State of Connecticut.

In the summer of 1985 ESP Associates applied to the Darien Planning and Zoning Commission ("the Commission") for approval of a special permit to construct 40 condominium units on a parcel of property located in the Town of Darien ("the Town") to be known as Villager Pond Condominiums ("the project").

Under the zoning designation for the plaintiff's property and the Town's zoning regulations at the time of the August 1985 application, the plaintiff was required to obtain a special permit in order to construct condominiums on its property.

At the time of plaintiff's application, Regs. §§ 506.2 and 513[1] provided an incentive for developers to build moderate income housing in the Town, under a formula pursuant to which an applicant could be granted permission to construct not more than 40% over the density otherwise allowed if the applicant agreed to establish at least 40% of the additional units as moderate income housing.

By its very language the provision was discretionary, not mandatory.

The plaintiff, in order to increase the number of units that it could construct, utilized Reg. § 506.2 in its application.

Of the forty units sought in the plaintiff's initial application, four were to be designated as moderate income housing.

At a hearing before the Commission held on the plaintiff's application on September 24, 1985, Attorney William Bieluch, representing the plaintiff before the Commission, stated that the plaintiff intended to donate

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[1] All regulations cited refer to the Darien Zoning Regulations, Exhibit 17 to the Defendants' Motion for Summary Judgment.

the four proposed moderate income units to a non-profit corporation that the plaintiff would form.

Paul Siladi, one of E.S.P. Associates' partners, attended the September 24, 1985 hearing with Mr. Bieluch.

The plaintiff's application to construct forty units was not approved by the Town's Inland Wetlands Commission, which found that one of the proposed buildings could not be built because of wetlands concerns.

As a result of the decision of the Inland Wetlands Commission, the plaintiff submitted a revised application which sought to construct 32 units and also requested approval of an additional five bonus units pursuant to Reg. § 506.2, for a total of 37 units.

The formula set out in Regulation § 506.2, as applied to the plaintiff's request for five additional units, allowed the Commission to approve the increase sought by the plaintiff provided that two of the additional units, or 40% of the increase, be reserved permanently for moderate income use.

On October 29, 1985, the Commission adopted a resolution ("the Resolution") granting the plaintiff's revised application and authorized the construction of 37 units.

According to the Resolution, five of the 37 units were bonus units granted pursuant to Reg. § 506.2 and 513 and under the formula set out in those regulations, two of the additional five units, or 40% of the additional units, were to be reserved for occupancy by moderate income persons. (The two moderate income units are hereinafter referred to as the Units.)

The Resolution also provided that a detailed plan to designate the units and to accomplish this goal had to be submitted by the applicant and determined acceptable by the Director of Planning prior to the filing of the Special Permit.

The Town's zoning regulations authorized the Commission, in granting the special permit, to attach such conditions as might be required to ensure continued compliance with the regulations.

The Commission granted the plaintiff all the additional units that the plaintiff's revised application requested under the moderate income housing incentive provisions.

The defendant Raymond Nurme is and, at all times relevant to this action, was the Planning Director for the Town.

The defendant David Keating is and, at all times relevant to this action, was the Zoning Enforcement Officer and the Assistant Planning Director for the Town.

The Resolution left open the submission of the plan regarding the Units in order to allow E.S.P. to proceed with its project while it determined how best to implement the administration of the Units.

On November 22, 1985, in accordance with the terms of the Resolution, the plaintiff's attorney wrote to Raymond Nurme setting out the plaintiff's proposed plan for designating and administering the Units.

Under the plan proposed in Mr. Bieluch's November 22, 1985 letter, the plaintiff was to donate the two Units to

a non-profit corporation to be formed under the name Darien Moderate Housing Inc.

Mr. Bieluch's letter also identified himself and another individual, Judy Morrison, as the initial shareholders and directors of that non-profit entity, and outlined the manner in which other directors and officers would be determined.

Based on the plan proposed in this letter, which he found to be in compliance with the Resolution, Mr. Nurme issued the special permit sought by the plaintiff.

The special permit for the project was issued on January 6, 1986.

The special permit issued on January 6, 1986, authorized the construction of 37 units, two of which were dedicated for moderate income use.

Construction began and in the summer of 1986, the plaintiff sought the issuance of zoning compliance certificates for certain units that had been completed in Phase I of the project.

In response, the defendant Keating informed the plaintiff that he could not issue the certificates for any of the individual units within the first phase of the project, as identified in the application as approved, until the entire first phase was completed.

At the time that Mr. Keating informed the plaintiff of this, the question of how to administer the Units was not at issue between the plaintiff and the Town.

Sometime in this time frame, Mr. Keating was contacted by Attorney Bieluch, acting on behalf of the plaintiff, who sought to change aspects of the plan to designate the Units as set out in his November 22, 1985 letter.

Mr. Keating informed Attorney Bieluch that any changes had to be submitted to the Commission for its approval.

In the meantime, construction on the first phase was nearing completion and Mr. Keating wrote to Attorney Bieluch to inform him that the issue of what to do with the Units had to be resolved before he could issue certificates of zoning compliance permits.

The Town's zoning regulations prohibit the Zoning Enforcement Officer from issuing zoning compliance certificates unless the buildings and the proposed use of the buildings conform with applicable regulations.

Attorney Bieluch also contacted Mr. Nurme about proposed changes for the plan for the Units.

The proposed changes included changing the directors so that Mr. Siladi and Attorney Bieluch's wife, Patricia Cook-Bieluch, could serve as directors of the non-profit entity.

The plan proposed in Attorney Bieluch's November 22, 1985 letter did not identify either Mr. Siladi or Ms. Cook-Bieluch as directors of the non-profit corporation.

Mr. Nurme found these proposals unacceptable on the ground that they did not establish the entity as an independently controlled corporation to the degree that

the original proposal did. Nor did the proposal provide for the continuity that was appropriate.

The plaintiff also sought monetary reimbursement for the Units in these proposed changes.

Mr. Nurme believed this demand for monetary reimbursement to be contrary to the original plan to donate the Units.

The Town's zoning regulations in effect at the times relevant to this action required an applicant to apply in the same manner as the original application for any amendments or modifications to a special permit that had already been approved, except that minor changes or those not materially altering the permit as determined by the Commission, could be authorized by Commission approval only and without a public hearing.

The plaintiff never applied, in the same manner as it made the initial application, for an amendment or modification of the Special Permit with regard to the plan for the Units. Prior to June 1988, the Commission never approved any of the changes proposed to the plan for the Units.

In the meantime, the plaintiff never finalized the formation of the non-profit corporation as set out in the November 22, 1985 plan and as late as June 1988 was still awaiting approval from the Internal Revenue Service for the tax-free status of the corporation.

The plaintiff never finally implemented the plan for the dedication of the Units set out in Attorney Bieluch's November 22, 1985 letter.

During 1987 and 1988, there were numerous discussions and meetings held between the plaintiff and the defendants regarding the issue of how to administer the Units.

On March 30, 1988, Mr. Nurme wrote to Attorney Bieluch and outlined his, Mr. Nurme's, understanding that the plaintiff's plan, as set out in the November 22, 1985 letter and approved by the Commission, contemplated the donation of the Units.

Despite the failure to resolve this issue, Mr. Keating made arrangements that allowed him to issue zoning compliance certificates for various units beginning in 1987 that were otherwise in compliance with the special permit and regulations.

These arrangements, as well as others, were made in order to avoid delaying the project.

The Town's records reflect that, during 1987 and through July 1988, the Town's Zoning Enforcement Officer issued sixteen zoning compliance certificates for units in the plaintiff's condominium project.

The plaintiff has been unable to identify any specific zoning compliance certificates that were withheld solely because of the unresolved issue of the Units.

During 1987 and the first part of 1988, aspects of the plaintiff's project, other than the issue regarding the Units, were not in compliance with the regulations and the permit.

The zoning compliance certificate for the first of the two Units to be completed was issued in May 1988, one day after it was applied for.

The zoning compliance certificate for that first Unit was issued before the plaintiff and the Town had resolved the issue of what to do with the administration of the Units.

Construction was not begun on the second of the two Units until March 1988.

The defendant Raymond Nurme never demanded that the plaintiff convey the Units to the Town.

The defendant David Keating never demanded that the plaintiff convey the Units to the Town.

The only thing that the defendants Keating and Nurme demanded of the plaintiff regarding the Units in 1986-1988 was that the plaintiff resolve the issue of how to implement the administration of the Units.

Throughout that same time frame, the plaintiff had failed to implement its plan for the Units as set out in Attorney Bieluch's letter of November 22, 1985 and approved by Mr. Nurme in issuing the special permit.

In an attempt to resolve the issue with the Units, the plaintiff offered to donate one of the Units to the Town and to sell the other Unit to the Town for a set price, which was eventually established to be $90,000.00

In order to resolved this issue, the defendants approved this compromise.

Mr. Siladi opposed the proposal to convey the Units to the Town.

At the time the Agreement was executed, Mr. Siladi favored litigating the issue instead.

Mr. Eilson and Mr. Pacifico did not wish to litigate the issue of the Units and instead chose to execute the Agreement conveying the Units to the Town in order to resolve the issue.

On July 18, 1988, the defendant Raymond Nurme wrote to Attorney Bieluch and set out the terms of the agreement reached by the parties.

On July 22, 1988, the plaintiff, by its president Paul Siladi, and its attorney, William Bieluch, signed off on this agreement ("the Agreement").

There is no allegation that the plaintiff corporation was not duly authorized to execute the Agreement.

The Agreement provided that the Town would accept title to and assume all administrative responsibilities for the Units, that one of the Units would be donated outright to the Town and that the Town would purchase the second Unit for ninety thousand dollars ($90,000.00).

The plaintiff's own appraisal of the project valued the moderate income units at $75,000.00.

There is no allegation by the plaintiff that any zoning compliance certificates were withheld after the execution of the Agreement.

By deed dated November 29, 1988 and recorded December 8, 1988, the plaintiff conveyed the first of the Units to the Town.

By deed dated and recorded April 4, 1990, the plaintiff conveyed the remaining Unit to the Town.

Sometime after the conveyance of the second of the Units to the Town, Mr. Siladi acquired the interests of Mr. Pacifico and Mr. Eilson in the plaintiff corporation.

Mr. Eilson presently lives in Florida and has no current interest in the plaintiff corporation.

Mr. Pacifico has no current interest in the plaintiff corporation.

The Units are the only moderate income housing constructed in the Town pursuant to Reg. §§ 506.2 and 513.

The plaintiff's application that is at issue in this lawsuit is the only application made pursuant to Reg. §§ 506.2 and 513 that was ever approved by the Commission.

There are no specific allegations of wrongdoing by any of the individual defendants while acting in their individual capacities.

The only allegations of wrongdoing asserted against any of the individual defendants relate to their actions as members or employees of either the Town, the Commission, the Darien Representative Town Meeting ("the RTM") or the Board of Selectman.

The defendant Jane Branigan, at all times pertinent to the plaintiff's claims, was a member of the RTM for the Town of Darien.

The RTM is the legislative body governing the Town of Darien.

The only allegations made or evidence produced against the defendant Jane Branigan in connection with

the plaintiff's claims in this action concern actions she took in her capacity as a member of the RTM.

The present lawsuit is the only lawsuit instituted by the plaintiff against any of the defendants regarding the project and any legal claims arising from that project.

THE DEFENDANTS,

By: /s/ John Wayne Fox
John Wayne Fox
Federal Bar No.: CT08500
Curtis, Brinckerhoff & Barrett
666 Summer Street
Stamford, CT 06901
203 324-6777

CERTIFICATION

This is to certify that a copy of the foregoing was mailed, postage prepaid and properly addressed on this 8th day of January, 1996 to:

Ridgely W. Brown, Esquire
Brown and Brown
P O Box 1205
Darien, Connecticut 06820

By: /s/ John Wayne Fox
John Wayne Fox
Federal Bar No.: CT08500
Curtis, Brinckerhoff & Barrett
666 Summer Street
Stamford, CT 06901
203 324-6777

APPENDIX F

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

VILLAGER POND, INC.	)	
	)	CASE NO.
v.	)	3:93CV00712 (PCD)
TOWN OF DARIEN, ET AL	)	

JUDGMENT

This cause having come on for consideration of defendants' motion for summary judgment or in the alternative for judgment of dismissal before the Honorable Peter C. Dorsey, Chief United States District Judge, and the issues having been duly considered and on April 22, 1996, the motion having been granted absent objection,

It is ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendants.

Dated at New Haven, Connecticut, this 31st day of May, 1996.

KEVIN F. ROWE

CLERK, UNITED STATES DISTRICT COURT

BY /s/ Illegible
DEPUTY IN CHARGE